Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1975

No. 75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil C. Williams, as members of the Charlotte City Council and individually,

Petitioners

v.

Local 660, International Association of Fire-Fighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight and R. D. McCall, as officers of Local 660 and individually,

Respondents

****

On Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

****

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IN THE

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City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, et al,

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v.

Local 660, International Association of Firefighters, an unincorporated labor organization, et al,

Respondents

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

The petitioners, City of Charlotte and its Councilmen, respectfully petition this Honorable Court for a writ of certiorari to review a judgment and opinion of the Court of Appeals for the Fourth Circuit, rendered in this cause on June 17, 1975.

I. OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported. The opinion and order of the United States District Court for the Western District of North Carolina is reported in 381 F. Supp. 500. Copies of these opinions are appended to this petition.

II. JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was made and entered on June 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

III. QUESTIONS PRESENTED

The questions presented for review are:

1. Have petitioners, by following a policy of allowing only payroll withholdings which benefit all of its employees, established a rational basis for denying union dues check off to approximately 351 city-employed firemen?

2. Is it mandatory for a municipality, absent a statute requiring it, to afford voluntary union dues check off for the benefit of a union because it permits withholdings for other items such as medical and life insurance, savings plans and a charity organization which are available to all of its employees?

3. Does North Carolina General Statute § 95-98 prohibit a municipality from checking off union dues for the benefit of a union, when the statute declares illegal and against public policy any contract or agreement between a municipality and a labor union if, by that contract, the union becomes bargaining agent for any employee?

4. Were the Findings of Fact affirmed by the Fourth Circuit Court supported by the evidence?

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Amendments to the U. S. Constitution involved in this case are the First Amendment cited in Volume I, page XLVI of the U. S. Code, the Ninth Amendment cited in Volume I, page XLVII of the U. S. Code, and the Fourteenth Amendment cited in Volume I, page XLVII of the U. S. Code which provide as follows:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Jurisdiction at the District Court level was invoked under 28 U.S.C., Sections 1331 and 1343, and Title 42 of the U. S. Code, Section 1983 which provide as follows:

28 U. S. Code 1331

(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U. S. Code 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U. S. Code 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.

The statute of the State of North Carolina which is involved in this case is cited in Volume 2C, Section 95-98 at page 689 of the General Statutes of North Carolina which provides as follows:

North Carolina General Statute 95-98

Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality

of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect.

V. STATEMENT OF CASE

This proceeding arises in the United States Court of Appeals for the Fourth Circuit, and seeks a review of a decision handed down by that Court on June 17, 1975. (A-3). Respondents commenced a civil action in the United States District Court for the Western District of North Carolina on October 2, 1973 seeking declaratory and injunctive relief. Respondents also sought to redress the deprivation of rights, privileges and immunities secured by the First and Ninth Amendments and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

In the Complaint, Respondents contended that Petitioners, City of Charlotte, a municipal corporation in the State of North Carolina, and its City Councilmen had engaged in a pattern and practice of refusing to withhold or check off union dues from members of Local 660 who are employees of the City of Charlotte's Fire Department. Respondents further contended that the City of Charlotte had approved the withholding of monies from employee wages for such items as medical and life insurance payments, savings plans and charitable contributions. The complaint alleged that this was arbitrary and capricious and violated respondents' rights under the

First Amendment to the United States Constitution to freedom of speech, freedom of assembly, including their right to organize, petition and to bargain for rights and privileges of employment, as well as a violation or rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1331, 1343, and 42 U.S.C. 1983.

The respondents submitted to the District Court, by affidavits, that two insurance companies had been unwilling and unable to offer a group life insurance plan to Local 660 and its members until the members were afforded voluntary dues check off by the City of Charlotte. Respondents contended that the City's refusal to grant check off severely and materially impinged on their rights to associate together for other lawful purposes.

The U. S. District Court, the Honorable James B. McMillan, Judge Presiding, held a hearing on February 1, 1974 on certain evidence submitted by affidavits and interrogatories, and requested that the parties file additional evidence as to the number of Charlotte firemen employed and the number of employed firemen belonging to the union, as well as information concerning the items for which the City voluntarily withheld deductions from the wages of its employees.

By affidavit, one of the respondents submitted to the Court that there were 351 dues

paying members of Local 660 out of a work force of 543 uniformed firemen.

Evidence was submitted to the District Court by the petitioners that the only monies withheld from wages at the request of employees, other than those specifically required by law, were monies for savings plans, (credit unions, U. S. Savings Bonds and a deferred compensation plan), a community charity (United Way), which consolidates most of the local charities for Mecklenburg and Union Counties, medical and life insurance premiums, and the Firemens' Voluntary Pledge Fund, which is not a regular deduction but is withheld from the wages of firemen voluntarily only upon the death of an employed fireman for the benefit of his survivors. In addition, by affidavits of the Personnel Director and the City Manager, information was submitted to the Court on the City's policy for determining allowable withholdings.

No written standards or guidelines exist for determining which requests for withholdings will be permitted, but the Charlotte City Council has established a policy through practice and has adhered generally to this policy, that no requests for withholding would be permitted which were not available, at option, to all of the employees of the City of Charlotte.

Since 1968, dues check off has been denied to the American Federation of State,

County and Municipal Employees, Local 660, International Association of Firefighters, the North Carolina Labor Alliance, Retail, Wholesale and Department Store Union and the North Carolina State Firemen's Association, as well as numerous commercial organizations.

A hearing was held in District Court on July 8, 1974 on the cross-motions for summary judgment, and on September 5, 1974, Findings of Fact, Conclusions of Law and an Order was entered dismissing Local 660 as a party plaintiff and granting individual plaintiffs' motion for summary judgment. The District Court ruled that the City of Charlotte and its Councilmen were enjoined from refusing to withhold money from the individual plaintiffs' wages to be paid to Local 660 so long as the City continued "without clearly stated and fair standards, to withhold monies from the paychecks of City employees for other purposes, organizations and entities not specifically required by law..." (A- 14). The District Court's dismissal of Local 660 recognized that the Fourteenth Amendment under the facts of the case, applied primarily to the individual plaintiffs.

Petitioners appealed this action to the U. S. Court of Appeals for the Fourth Circuit, which rendered its opinion on June 17, 1975 affirming the judgment of the District Court. A stay of the mandate was granted by the U. S. Court of Appeals for the Fourth Circuit on July 21, 1975 pending this application for a writ of certiorari. (A- 1).

VI. ARGUMENT

The opinion of the United States Court of Appeals for the Fourth Circuit should be reviewed because it has decided an important question of federal law which has not been, but should be, settled by this Court, and, petitioner respectfully submits, is in conflict with an interpretation of a North Carolina State Statute.

The Court below has rendered an opinion on a First Amendment right which will have a far-reaching effect in the field of employer-employee relations and labor negotiations, both in the public and private sector of North Carolina and other parts of the United States. This decision has equated the granting of payroll withholdings or deductions for employee fringe benefits to the granting of a request for union dues check off for the benefit of a labor union, absent a statute or agreement with a union requiring it.

If the Fourth Circuit's opinion (A- 3), should be sustained, then both public and private employers utilizing unionized employees would be required to either remove union dues check off as an item in the collective bargaining process and grant dues check off as a matter of right, or, in the alternative, refuse to render its employees any benefit programs which would result in the withholding of employees' pay.

The decision of the Fourth Circuit permits petitioners to adopt reasonable, objective

standards based upon a rational classification for determining which requests for withholding will be granted or denied and move to reopen the case in District Court. (A- 6). The City of Charlotte respectfully contends that it has already established a rational basis for determining permitted withholdings by granting only those requests which would be available to and benefit all of the employees of the City, and not just special interest groups. The withholding of pay for various employee programs is regarded as a fringe benefit and each request is considered to determine the number of overall employees which will benefit by the withholding, and whether or not such a benefit would outweigh the administrative costs of implementing such a program.

At the time of the litigation in District Court, there were 351 dues paying members of Local 660 employed as firemen out of a total of 543 uniformed firemen. Granting dues check off for this special group of employees does not fall within the guidelines of the City's policy of permitting only deductions available to and for the benefit of all of its employees. Petitioner submits that a request for union dues check off for the benefit of a union is so inherently different from a request for a deduction for medical or life insurance or any other one of the withholdings allowed, that, in itself, it creates a different classification.

The Fourth Circuit and District Courts have decided this issue on the basis of equal protection as guaranteed by the Constitution.

Justice Stewart in Shapiro v. Thompson, 394 U.S. 618, 22 L Ed 2d 600, 89 S. Ct. 1322 (1969), articulates the limits of the fundamental rights rationale employed by this Court:

> The Court today does not 'pick' out particular human activities, characterize them as 'fundamental', and give them protection ... To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives that right no less protection than the constitution itself demands. Ib. at page 620.

It is therefore respectfully submitted that this petition should be reviewed to decide if union dues check off is a "fundamental right" under the provisions of the Fourteenth Amendment.

In delivering the opinion in San Antonio School District v. Rodriguez 411 U.S. 1, 36 L Ed 2d 16, 93 S. Ct. 1278 (1973), Justice Powell stated:

> It is not in the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Ib. at page 43.

Petitioners respectfully contend that the lower courts' decisions have improperly created a substantive constitutional right.

Union dues check off has always been a negotiated item and a part of the collective bargaining process, and absent a statute or labor contract requiring check off, it is not a matter of right. In National Relations Board v. Reed and Prince Mfg. Co., 205 F. 2d 131, (C.A. 1), (1953), at page 136 the United States Court of Appeals for the First Circuit said:

> On the check-off proposal, the company registered its opposition, mainly on the ground that this was not a proper subject of collective bargaining. In this the company was mistaken.

In Porter Co. v. NLRB, 396 U.S. 817, 24 L Ed 2d 69, 90 S. Ct. 79 (1969), the U. S. Supreme Court granted certiorari to consider whether the NLRB Board under the circumstances of the case had the power to remedy the unfair labor practice by requiring the company to agree to check off the dues of the workers. The Supreme Court stated the Board had the power under the Labor Management Relations Act to require employers and employees to negotiate; however, "it was without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." Although the City of Charlotte is not covered under the provisions of the National Labor Relations Act, this point is made to show that even Federal legislation does not compel a company to check off dues.

North Carolina General Statute 95-98 prohibits contracts between governmental agencies or unit, including cities, and labor unions as bargaining agents for public employees. The City of Charlotte contends that an agreement for union dues check off between a city employee, who is a member of a labor union,and the city is a type of contract to which the union is a third party beneficiary.

In 1969, in a written opinion, the North Carolina Attorney General's Office stated:

> N.C.G.S. 95-98 prohibits and forbids any agreement or contract between your city or municipality (Charlotte) and any labor union or trade organization as bargaining agency for any public employees. This would be or amount to an agreement between you and the union to check off and pay over to the union the union dues from the wages of these employees of the City of Charlotte. ... A check off agreement whereby union dues are deducted from the employees' wages is a function or segment of collective bargaining. Since the check off agreement deals with a segment or function of collective bargaining with the labor union, it is expressly prohibited by G. S. 95-98... and the City of Charlotte has no authority of law and is expressly prohibited from operating or making

> any deductions or check-off from its employees' wages for the purposes of paying union dues or for that matter any other fee or assessments that pertain to the business of the labor union or labor organization. N. C. Attorney General Reports, 1968-70, Vol. 40, at page 591.

The Fourth Circuit Court stated in its opinion that authorities cited by petitioners are distinguishable, either because the request for withholding arose and was denied in the context of collective bargaining or because a rational classification was established. (A-5). In this action, denial of union dues did not arise in the context of collective bargaining because North Carolina State law prohibits union contracts with municipalities. The Courts have in the past drawn a distinction in denying dues check off between unions having a bargaining agreement and those not having such a contract, and between a majority union and a minority union. Bauch v. City of New York, 237 N.E. 2d 211, 21 N.Y. 2d 599, (1968). However, the City of Charlotte has been placed in the untenable position by this decision of the Fourth Circuit Court of having to grant union dues check off without a union contract.

Petitioner City of Charlotte has a substantial interest in denying union dues check off so that it could in the future, if necessary, be an item for collective bargaining if the City is ever

placed in a bargaining position. For the District and Fourth Circuit Courts, to, by judicial edict, remove union dues check off from the category of those items normally bargained for collectively is, in effect, to deny the City's right to bargain for this item. This, in itself, will affect municipalities all over the United States. The City's administration has a duty to maintain stability with respect to its employees and their organization, and, insofar as possible, to avoid the devastation caused by work stoppages and strikes. These are major responsibilities of the City, and whether or not the denial of dues check off is the best way to further these objectives is not relevant. Certainly, it can be argued that a denial of dues check off is reasonably related to the attainment of this permissible and worthwhile objective.

VII. CONCLUSION

Wherefore, Petitioners City of Charlotte and its Councilmen, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled case.

For the reasons set out above, and because the question of granting union dues check off has never been decided out of the context of collective bargaining agreements, it is respectfully submitted that this petition should be granted.

City Attorney's Office
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600 E. Trade Street
Charlotte, North Carolina
704-374-2254

By: Henry W. Underhill, Jr.
Henry W. Underhill, Jr.

W. A. Watts
Counsel for Petitioners

AFFIDAVIT CERTIFYING SERVICE

I, W. A. Watts, an attorney in the office of the City Attorney for the City of Charlotte, North Carolina, attorneys of record for The City of Charlotte and its City Councilman, Petitioners in this action, herein depose and say that on the 14th day of August, 1975, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the appellees herein, by delivering the same to Jonathan Wallas and J. Levonne Chambers, counsel of record for said appellees located at 951 S. Independence Boulevard in the City of Charlotte, North Carolina.

W. A. Watts
W. A. Watts

Subscribed and sworn to before me, at Charlotte, North Carolina this 8th day of August, 1975.

Dolores B Ballard
Notary Public

My commission expires: June 15, 1976.

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 74-2240

Local 660, International Association of Firefighters, an unincorporated labor organization, et al,

Appellees,

versus

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, et al,

Appellants.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte.

Upon motion of the appellants, and the response thereto, by counsel,

IT IS ORDERED that the mandates in the

above-entitled cases be, and they are hereby stayed pending application of the appellants in the Suprome Court of the United States for a writ of certiorari to this Court, provided the applications are filed within the time permitted by law.

For the Court-By Direction.

/s/William K. Slate II
Clerk

Filed: July 21, 1975

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 74-2240
NO. 74-2241
NO. 75-1126

Local 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, et al,
Plaintiffs-Appellees*

vs.

CITY OF CHARLOTTE, et al,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of North Carolina, Charlotte Division. James B. McMillan, Judge.

Argued May 5, 1975 Decided June 17, 1975

Before RUSSELL and FIELD, Circuit Judges, and THOMSEN, Senior District Judge

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Jonathan Wallas (J. LeVonne Chambers on brief) for Plaintiffs-Appellees; W. A. Watts (Henry W. Underhill, Jr., and H. Michael Boyd on brief) for Defendants-Appellants.

* Local 660 is a plaintiff-appellant. See note 1 below.

THOMSEN, District Judge

Local 660, International Association of Firefighters, and five officers of Local 660, as such officers and individually, brought this action against the City of Charlotte, the Charlotte City Council and members of the Council, as such and individually, to require defendants to withhold their union dues and the dues of other members of Local 660 who make a similar request. After a hearing on cross-motions for summary judgment, at which both sides presented affidavits, the district court dismissed the union as a plaintiff, but granted the motion of the individual plaintiffs.[1] The order provided: "So long as defendants continue, without clearly stated and fair standards, to withhold moneys from the paychecks of City employees for other purposes, organizations and entities not specifically required by law, defendants *** are enjoined from refusing to withhold moneys from the paychecks of the individual plaintiffs to be paid to Local 660." Defendants have appealed from that order and from the denial of their 60(b)(3) motion, which was based upon a factual error in one of the affidavits which the district court and we believe to be immaterial.[2]

1/ The union appealed from that part of the order which dismissed it as a plaintiff, but has shown no reason for reversal.

2/ The error was in the name of an insurance company which refused to issue a group policy unless the withholdings were allowed.

The district judge made the following material findings: that defendants now, upon request, withhold moneys from the paychecks of City employees, to be paid to various charities, government subdivisions, private insurance companies and other beneficiaries; that no written standards or guidelines exist to determine when employees of the City may have moneys deducted from their paychecks; that defendants' practice has been to allow withholdings required by law, withholdings available to all City employees and withholdings available to all employees within a single employee unit, such as the Fire Department; that defendants have not denied any requests for withholdings from any persons or organizations in the Fire Department within the past ten years except plaintiff's requests; and that refusal of defendants to withhold $4.00 a month, as requested, made it impossible for plaintiffs and their association to obtain group insurance and difficult for them to provide other lawful benefits.

We recognize that defendants may exercise wide discretion in deciding what requests are to be honored. This discretion, however, may not be exercised arbitrarily or to promote an impermissible objective. Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964). The authorities cited by defendants are distinguishable, either because the request for withholding arose and was denied in the context of collective bargaining, or because a rational classification was established.

A state statute (N.C.G.S. §95-98) prohibits contracts between governmental agencies or units (including cities) and labor unions as bargaining agents for public employees; but that statute does not justify denying the request for withholding made by plaintiffs in this case. The order appealed from will be affirmed.[3]

Defendants may hereafter adopt reasonable, objective standards for determining which requests for withholding will be granted and which denied. If, on the basis of a rational classification made under such standards, defendants determine that such withholding requests as are involved in this case should be denied, the defendants may move to reopen the case in the district court.

Affirmed.

3/ Jurisdiction was invoked under 28 U.S.C. 1331 and 1343, and 42 U.S.C. 1983, to redress rights secured by the First, Ninth and Fourteenth Amendments. None of the defendants has challenged the jurisdiction of the district court, but we note that a municipal corporation is not a "person" within the meaning of 42 U.S.C. 1983. City of Kenosha v. Bruno, 412 U.S. 507 (1973). It is not necessary to decide whether jurisdiction over the City and the Charlotte City Council as such can be sustained under any of the other jurisdictional grounds invoked, because the members of the Council were sued individually, and the court had jurisdiction to grant the relief requested against them. Harper v. Kloster, 486 F.2d 1134 (4 Cir. 1973).

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA

CHARLOTTE DIVISION
C-C-73-236

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, et al., Plaintiffs, -vs- THE CITY OF CHARLOTTE, et al., Defendants.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

A hearing was conducted on July 8, 1974, to consider all pending matters, including the defendants' motions to dismiss, the defendants' motion for summary judgment, and the plaintiffs' motion for summary judgment.

Based upon the pleadings, affidavits, discovery materials and arguments of counsel, the court makes findings of fact and conclusions of law and renders the following order:

FINDINGS OF FACT

1. (a) Plaintiffs R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight, and R. D. McCall, are all members and officers of Local

660, International Association of Fire Fighters, and members of the Charlotte Fire Department. The individual plaintiffs brought this action to require the defendants to withhold moneys from their paychecks for the benefit of their association, Local 660, so long as the defendants continue to withhold moneys from employees' checks for other purposes and organizations. The plaintiffs contend that the refusal of the defendants to withhold moneys (or dues) as so requested has made it impossible for them and their association to obtain certain lawful benefits (e.g., insurance benefits), and has made it difficult for them to provide other lawful benefits (e.g., the assistance of counsel). The defendants do not dispute that their action has this effect upon plaintiffs.

(b) Plaintiff, Local 660, International Association of Fire Fighters, is an unincorporated labor organization. Some 351 of the 543 uniformed employees of the Charlotte Fire Department, including the individual plaintiffs, are members of Local 660. Since 1970, a majority of the uniformed firemen in Charlotte have been members of Local 660, which was formed, among other things, to enable its members to join together to work for all lawful mutually beneficial purposes, including the purchasing of insurance on a favorable "group" basis, and the retention of legal counsel. Membership in Local 660 is presumptively open to all Charlotte firemen.

2. The defendant, City of Charlotte, is a municipal corporation of the State of North Carolina charged by state law with general

supervision of the Fire Department of the City of Charlotte, North Carolina, including the establishment of wages and salaries, rates of pay, hours of employment and various rules and regulations.

3. The defendant, Charlotte City Council, is a governing body whose members are charged under North Carolina law with the establishing of rules and regulations and policies for the operation of the various departments and agencies of the City of Charlotte, including the Charlotte Fire Department.

4. The individually named defendants are all duly elected or appointed members of the Charlotte City Council. They are sued in their capacity as members of the City Council and in their individual capacities.

5. Since 1970, the plaintiffs as an organization and as individual members of Local 660, have requested the defendants to check off their union dues. This request has been denied each year. The present monthly dues of Local 660 are $4.00.

6. The defendants presently, upon request, withhold or "check off" moneys from the paychecks of City employees to be paid to various charities, government subdivisions, private insurance companies and other beneficiaries. The moneys thus checked off are delivered directly to various organizations or entities for the following purposes:

(a) Federal Income Tax
(b) State Income Tax
(c) North Carolina Firemen Retirement
(d) North Carolina Local Government Retirement System
(e) Medical Insurance (Life of Virginia)
(f) Life Insurance (Life of Virginia)
(g) United States Savings Bonds
(h) United Way (Mecklenburg and Union Counties)
(i) Firemen Benefit Fund (Lincoln National Life)
(j) Charlotte Fire Department Credit Union
(k) Aetna Deferred Compensation Program
(l) Charlotte Fire Department Voluntary Pledge Fund
(m) City-County Tax Levy
(n) State Tax Levy

7. Defendants have not denied any requests for payroll deductions from any persons or organizations in the Fire Department within the past ten years except the plaintiffs' requests. No written standards or guidelines exist to determine when City employees may have moneys deducted from their paychecks. The defendants' practice has been to allow check offs from employees' pay to organizations or programs as required by law or where the check off option is available to all employees within a single employee unit such as the Fire Department. Defendants have not allowed check off options serving only single employees or programs which are not available either to all City employees or

to all employees engaged in a particular section of City employment.

8. The plaintiffs have recently conducted negotiations to obtain a group life insurance plan for the membership of Local 660. Two life insurance companies (Jefferson Standard Life Insurance Company and Vulcan Life Insurance Company) have informed the plaintiffs that in order for the membership of Local 660 to be eligible for a group life insurance plan it would be necessary for the plaintiffs to obtain dues check off from the City of Charlotte.

9. The refusal of the defendants to withhold the dues of the individual plaintiffs herein and other members of Local 660 prevents the plaintiffs and other Fire Department employees from associating together for the purpose of obtaining group life insurance and substantially hinders plaintiffs and other Fire Department employees from associating together for the purpose of engaging legal counsel to promote their mutual interests.

10. The City's payroll deduction procedure is computerized. Individual employees are routinely given a computer card appropriate for a particular deduction. They sign the cards and they are returned to the general office for processing. Withholding union dues from the wages of individual firemen would be no more difficult than processing the deductions for any of the presently existing programs for which payroll deductions are made.

11. The defendants have suggested no compelling state interest in refusing to withhold moneys for the benefit of Local 660 when requested to do so by individually named plaintiffs, nor any rational basis for the refusal.

12. Under the circumstances, the defendants' refusal to withhold the moneys requested from the paychecks of the individual Charlotte firemen is an arbitrary and standardless infringement of the individual plaintiffs' rights to equal protection of laws, so long as defendants make payroll deductions for other purposes.

CONCLUSIONS OF LAW

1. Although plaintiffs have no right per se to have moneys withheld from their paychecks for the benefit of Local 660, nevertheless, once the defendants offer the benefits of withholding to certain organizations and entities the defendants, under the Fourteenth Amendment, must administer such a withholding program in a fair and equitable manner. Griffin v. School Board v. Prince Edward County, 377 U.S. 218 (1964).

2. There is no difference in the state interests involved in the various payroll deductions which justifies the discriminatory withholding policy. The refusal of the defendants to withhold or check off moneys when requested to do so by the individual plaintiffs for the benefit of Local 660 constitutes a violation of the individual plaintiffs' rights to equal protection of laws under the Fourteenth Amendment

to the Constitution of the United States.

3. Although defendants are under no duty to enter into collective bargaining agreements or other contracts with Local 660 or with the individual plaintiffs, the individual plaintiffs are nevertheless entitled to equal treatment with respect to the payroll deductions they request. (Desire to discourage municipal labor organizations including Local 660 would of course be an impermissible reason for refusing to withhold moneys from the paychecks of the individual plaintiffs.)

4. The defendants have offered no reasonable alternatives to their absolute refusal, such as establishing reasonable regulations dealing with withholding to be applied to all persons seeking such administrative assistance.

5. North Carolina General Statutes §95-98, cited by the defendants as authority prohibiting the requested relief, does not apply to this case; no contracts or agreements are contemplated between defendants and Local 660.

6. The motions of the defendants to dismiss with respect to Local 660 should be granted since the Fourteenth Amendment as cited above applies under the facts of this case, primarily to the individual plaintiffs.

ORDER

IT IS, THEREFORE, ORDERED:

1. The motion to amend the complaint and the motion to substitute parties filed by the plaintiffs on July 3, 1974 are allowed.

2. The motions of the defendants to dismiss with respect to the plaintiff Union are allowed. All other motions of the defendants are denied.

3. The motion of the individual plaintiffs for summary judgment is granted.

4. So long as the defendants continue, without clearly stated and fair standards, to withhold moneys from the paychecks of City employees for other purposes, organizations and entities not specifically required by law, the defendants, their agents, successors, employees and any persons acting in concert with the defendants or at their direction are enjoined from refusing to withhold moneys from the paychecks of the individual plaintiffs to be paid to Local 660.

This 4th day of September, 1974.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Filed: Sept. 5, 1974
Hon. J. Toliver Davis, Clerk
U. S. Dist. Court, Charlotte, N. C.

Supreme Court, U. S.
FILED
NOV 24 1975
MICHAEL RODAK, JR., CLER

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-250

CITY OF CHARLOTTE, et al.,

Petitioners,

—v.—

LOCAL 660, INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR CERTIORARI FILED AUGUST 16, 1975
CERTIORARI GRANTED OCTOBER 14, 1975

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

Local 660, International Association of Firefighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight, and R. D. McCall, as officers of Local 660 and individually,

Plaintiffs,

—vs—

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Ruth Easterling, Joe Withrow, Sandy Jordan, and James McDuffie, as members of the Charlotte City Council and individually,

Defendants.

Federal Question — Civil Rights Title 42, Sec. 1983 —plaintiffs seek declaratory judgment against discriminatory practice of defendants allegedly refusing to withhold union dues from their pay checks.

Dated	No.	Proceedings	No. C-C-73-236
10-2-73	#1	Complaint	
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2-1-74	#7	Affidavit of D. F. Black	
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Dated	No.	Proceedings	No. C-C-73-236
2-1-74		Hearing—pre-trial and motions	
2-5-74	#9	Memorandum (J. B. McMillan)—motions to dismiss denied; pltfs requested to supply evidence as to number of firemen in the Dept. and number that belong to union; defts requested to supply evidence indicating which of the 16 items checked off are authorized by state law. Clerk to set matter for further hearing.	
2-4-74		Documentation of authorities for various salary deductions requested by Judge McMillan in Item 9 with Exhibits 1-5	
2-22-74		Affidavit of Robert A. Earle, Personnel Director of City of Charlotte	
2-28-74	#10	Affidavit of D. F. Black	
6-26-74	#11	Defendants' Motion to Dismiss	
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IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

COMPLAINT

(Filed October 2, 1973)

I

(a) Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1331 and 1343, this being a suit in equity authorized by law, Title 42, United States Code, Section 1983, to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a State of rights, privileges and immunities secured by the Constitution and laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by the First and Ninth Amendments and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

(b) Jurisdiction is further invoked under Title 28, United States Code, Sections 2201 and 2202, this being a suit for a declaratory judgment, declaring the unconstitutionality of the pattern and practice of the defendants in refusing to withhold or "check-off" union dues on behalf of Local 660, International Association of Fire Fighters.

II

(a) Plaintiff, Local 660, International Association of Fire Fighters (hereinafter "Local 660"), is an unincorporated labor organization whose goals include providing assistance to individual fire fighters, fire departments and local communities to upgrade firefighting practices and techniques. The membership of Local 660 is composed of numerous dues-paying fire fighters employed by the defendant City of Charlotte.

(b) Plaintiffs R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight and R. D. McCall are fire fighters employed by the defendant City of Charlotte. Middleton, Brawley, Black, Knight and McCall are members and officers of Local 660 and are dedicated to providing first-class fire protection to the residents of Charlotte, Mecklenburg County, North Carolina.

III

(a) The defendant City of Charlotte is a municipal corporation of the State of North Carolina, charged by the State Constitution, laws and ordinances with the general supervision of the Fire Department of the City of Charlotte, North Carolina, including the establishment of wages and salaries, rates of pay, hours of employment and the various rules and regulations of the Charlotte Fire Department.

(b) The defendant Charlotte City Council is the governing body charged by the North Carolina State Constitution, laws and ordinances with establishing rules, regulations and policies for the day-to-day operation of the various departments and agencies, including the Charlotte Fire Department, of the City of Charlotte.

(c) The defendants Fred Alexander, James Whittington, Milton Short, Ruth Easterling, Joe Withrow, Sandy Jordan,

and James McDuffie are citizens of Charlotte, North Carolina, and are duly elected or appointed members of the Charlotte City Council. Said council members are sworn to enforce the constitutions and laws of the United States and the State of North Carolina and are responsible for establishing and administering the rules, regulations and policies of various Charlotte departments and agencies, including the Charlotte Fire Department.

IV

The defendants have engaged in a pattern and practice of refusing to withhold or check-off union dues from members of Local 660 who are employees of the City of Charlotte and the Charlotte Fire Department. Local 660, through its duly elected officers, has made numerous requests to the defendants and their agents to have the defendants check-off dues from those members of Local 660 who approve such check-off for the benefit of Local 660. All such requests, including request made in September, 1973, have been denied.

The defendants have approved the withholding or check-off from fire department employee wages or monies for such matters as various insurance payments and charitable contributions, among others, but have arbitrarily refused to allow Local 660 and its cooperating union members to check-off labor organization dues. This arbitrary and capricious practice of the defendants violates, among other things, the plaintiffs' rights under the First Amendment to the United States Constitution to freedom of speech, freedom of assembly, including rights of the plaintiffs to organize, petition and to bargain for rights and privileges of employment. Said arbitrary practice also violates plaintiffs' rights guaranteed by the Due Process and Equal Protection clauses of the Fourteenth Amendment.

V

WHEREFORE, plaintiffs respectfully pray that upon the filing of this Complaint, the Court, as may appear proper and convenient:

(a) Declare that the practice of the defendants of selectively withholding or checking-off monies of Fire Department employees is unconstitutional;

(b) Issue a mandatory injunction requiring the defendants to withhold or check-off the labor organization dues of all members of Local 660 who so request in the same manner that contributions or assessments for other organizations or purposes are withheld;

(c) Grant plaintiffs their costs herein including reasonable attorney fees and expenses; and

(d) Grant such other, further or alternative relief as to the Court may appear equitable and just.

Respectfully submitted,

s/Jonathan Wallas

JONATHAN WALLAS

J. LEVONNE CHAMBERS

Chambers, Stein, Ferguson & Lanning
Suite 710, East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202

Attorneys for Plaintiffs

This the 2 day of October, 1973

(Certificate of service omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

ANSWER AND MOTION TO DISMISS, OR IN THE ALTERNATIVE, A SUMMARY JUDGMENT

(Filed October 23, 1973)

W. A. WATTS, ATTORNEY FOR DEFENDANTS, ANSWERING THE COMPLAINT OF THE PLAINTIFFS AND REQUESTING THIS VERIFIED ANSWER BE USED AS AN AFFIDAVIT IN SUPPORT OF THE MOTIONS CONTAINED HEREIN AND AS NOTICE OF SAID MOTIONS, FOR THEIR MOTIONS AND ANSWERS, ALLEGES AND MOVES THE COURT AS FOLLOWS:

FIRST DEFENSE

The defendants, pursuant to Rule 12(b)(2) and (6) of the Federal Rules of Civil Procedure, move the Court that this action be dismissed because the complaint fails to state a claim against them upon which relief can be granted and, in support of this motion, the defendants assign the following reasons:

1. Title 42, United States Code, Section 1343, does not grant this Court jurisdiction to act against a municipal defendant, such defendant not being a "person" within the purview of that statute. Further, defendants deny that Sec-

tion 1983 grants the Court jurisdiction against any of the other named defendants because the matters and facts set forth in the complaint do not allege a violation of any "civil right" within the meaning of that statute. Rather, the facts alleged show that plaintiffs merely complain that the City has refused to withhold from employees' pay certain union dues, and the City has refused to pay these union dues so withheld over to plaintiff union. In other words, defendants have, according to the complaint, in their discretion refused to establish and utilize any "check-off" system. This refusal is certainly not a violation of any civil rights of any of the plaintiffs but rather it is the exercise of sound discretion inherent in a municipality and its governing body. Further, neither the First, Ninth and Fourteenth Amendments to the Constitution of the United States, nor any other constitutional provisions, set forth any right in any person to require a municipality to utilize its accounting and financial facilities in establishing and maintaining such a check-off system in favor of any labor union.

SECOND DEFENSE

The defendants, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, move the Court for a summary judgment. Plaintiffs have prayed for injunctive relief of an affirmative nature as well as for a declaratory judgment, and they have failed to allege a failure on the part of the defendants to perform a clear legal duty so as to provide grounds for equitable relief and a valid basis for a decree in equity. Consequently, plaintiffs request for injunctive relief and for a declaratory judgment should be dismissed.

ANSWER

The specific allegations of plaintiffs' complaint are answered hereunder:

I

(a) Answering the allegations of subparagraph (a), defendants deny that this Court has jurisdiction pursuant to Title 28, United States Code, Sections 1331 and 1343, or under Title 42, United States Code, Section 1983.

(b) Answering the allegations of subparagraph (b), defendants deny that this Court has jurisdiction pursuant to Title 28, United States Code, Sections 2201 and 2202.

II

(a) Answering the allegations of subparagraph (a), defendants admit on information and belief that plaintiff, Local 660, International Association of Firefighters, is an unincorporated labor organization. The remaining allegations are denied, defendants lacking sufficient information to form a belief.

(b) The allegations of subparagraph (b) are denied, defendants lacking sufficient information to form a belief.

III

(a) The allegations of subparagraph (a) are admitted.

(b) The allegations of subparagraph (b) are admitted.

(c) The allegations of subparagraph (c) are admitted.

IV

Answering the allegations of paragraph IV, it is admitted that defendants have declined to withhold or check-off union dues for members of Local 660 or any other labor organization. It is admitted that some members of Local 660, from time to time, have requested that some kind of dues check-off be permitted and these requests have been denied.

It is admitted that defendants have approved the withholding of pay from certain employees, including fire department employees, for certain insurance programs and for other specific purposes, but in their discretion the defendants have refused to withhold or institute a dues check-off system for any labor organization. It is denied the defendants' classification of various things for which deductions might be made from its employees' pay is in any way arbitrary and capricious, but is a reasonable classification of various deductions which might be made from employees' pay. It is further denied that this classification of things which may be deducted from employees' pay and things which may not be deducted from employees' pay violates any of plaintiffs' rights to freedom of speech, assembly and right to organize, and plaintiffs' right to petition and bargain in any way with their employer. It is denied that the reasonable classification by defendants in any way violates plaintiffs' guaranteed right of Due Process and Equal Protection under the law. The remaining allegations of paragraph IV are denied.

AND AS A FURTHER ANSWER AND DEFENSE AND AS A PLEA IN BAR OF THE DEMAND OF THE PLAINTIFFS, the defendants allege and say:

North Carolina General Statute 95-98 has declared illegal, contracts between units of government, such as defendant City, and labor unions, trade unions, labor organizations, and the institution of a dues check-off system would, per se, require such a contract. Further, a ruling in favor of plaintiffs would in effect declare illegal and unconstitutional N.C.G.S. 95-98. For this reason defendants do hereby request that a Three-Judge Court be convened to hear and decide this controversy, including the constitutionality of N.C.G.S. 95-98.

WHEREFORE, HAVING FULLY ANSWERED THE COMPLAINT, DEFENDANTS PRAY THE COURT TO HOLD, RULE, ADJUDGE AND DECREE AS FOLLOWS:

(a) That the Court grant the motions of the answering defendants to dismiss this action, and that the Court grant any and all other motions as set forth as defenses in this action.

(b) That a Three-Judge Court be convened to hear and decide the constitutionality of N.C.G.S. 95-98.

(c) That this verified answer be treated as a affidavit for the purposes of the motions alleged herein by these answering defendants.

(d) That the plaintiffs be taxed with the cost of this action.

(e) That the answering defendants have such other and further relief as to the Court may seem just and proper.

Office of the City Attorney

s/W. A. Watts

W. A. WATTS

Attorney for Defendants
600 East Trade Street
Charlotte, N. C. 28202
704/374-2254

(Certificate of service omitted in printing)

NORTH CAROLINA
MECKLENBURG COUNTY

DAVID A. BURKHALTER, being first duly sworn, deposes and says:

That he is an officer of the City of Charlotte, to wit, its City Manager, and as such is authorized to make this oath; that he has read the foregoing and attached Answer And Motion To Dismiss, Or In The Alternative, A Summary Judgment; that the same is true of his own knowledge and belief except as to those matters and things therein stated upon information and belief, and as to those, he believes it to be true.

s/David A. Burkhalter

DAVID A. BURKHALTER
City Manager

(Jurat omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

PLAINTIFFS' FIRST INTERROGATORIES

(Filed November 19, 1973)

TO: W. A. WATTS, ESQ.
Attorney for Defendants
600 East Trade Street
Charlotte, North Carolina 28202

Plaintiffs request, pursuant to Rule 33, Federal Rules of Civil Procedure, that the defendants answer, under oath and according to law, the following written interrogatories:

1. State the names of all organizations, programs, and purposes for which the City has withheld or checked-off monies from paychecks of Fire Department employees within the last ten (10) years.

2. State the names of all organizations, programs, and purposes which have requested that monies be withheld or checked-off from paychecks of Fire Department employees and whose requests have been refused within the last ten (10) years.

3. State the names and addresses of all City officials who have, at anytime in the last ten (10) years, been responsible for deciding whether or not a specific request to check-off or withhold monies from paychecks of Fire Department employees will be allowed.

4. State the criteria utilized to decide whether or not a specific request for withholding or check-off of monies from wages of Fire Department employees will be allowed.

5. State whether the defendants require a written contract between organizations seeking to have monies withheld or checked-off from employee paychecks and the City. If so, state the date any such contracts were executed within the last ten (10) years and the name of the party contracting with the City. Further state where such contracts are now located or attach copies of said contracts.

6. State whether or not Fire Department employees who desire that monies be checked-off or withheld from their paychecks for specific purposes must sign written authorizations requesting that such withholding be made. If so, attach copies of blank authorization forms or state where such forms are located.

7. State whether or not the City Council has, at anytime within the last ten (10) years, debated, discussed, or voted upon the proposals or requests of Local 660, members of Local 660, or Fire Department employees to have union dues withheld or checked-off by the City. If so, state when such proposals or requests were debated and voted upon and the results of said votes.

8. State the names of all witnesses who the defendants presently intend to call to testify at the trial of this action.

This the 15th day of November, 1973.

Respectfully submitted,

s/Jonathan Wallas

JONATHAN WALLAS

J. LEVONNE CHAMBERS

Chambers, Stein, Ferguson & Lanning
Suite 730 East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202

Attorneys for Plaintiffs

(Certificate of service omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

ANSWER TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

(Filed December 17, 1973)

NOW COME the defendants by and through their agent, W. A. Watts, Deputy City Attorney, answering plaintiffs' first set of Interrogatories served on the defendants on November 16, 1973 as follows:

1. (a) Federal Income Tax
   (b) State Income Tax
   (c) North Carolina Firemen Retirement
   (d) North Carolina Local Governmental Retirement System
   (e) Medical Insurance—Life of Virginia
   (f) Life Insurance—Life of Virginia
   (g) United States Savings Bonds
   (h) United Way—Mecklenburg—Union
   (i) Firemen Benefit Fund—Lincoln National Life
   (j) Charlotte Fire Department Credit Union
   (k) Aetna Deferred Compensation Program

   (l) Charlotte Fire Department Voluntary Pledge Fund
   (m) City-County Tax Levy
   (n) State Tax Levy

2. There have been no denials for check-off in the Fire Department within the last ten (10) years with the exception of the I.A.F.F. dues check-off requests.

3.

Mayor and City Council	Office of Mayor 600 East Trade Street Charlotte, N. C. 28202
City Manager	Office of City Manager 600 East Trade Street Charlotte, N. C. 28202
Personnel Director	Personnel Department 600 East Trade Street Charlotte, N. C. 28202
Finance Director	Finance Department 600 East Trade Street Charlotte, N. C. 28202
City Attorney	City Attorney's Office 600 East Trade Street Charlotte, N. C. 28202

4. Because of a potentially large number of organizations that might desire withholding service, the City has generally limited such withholdings to tax, retirement-insurance, limited investment situations and certain charitable contributions. Unrestricted withholding is impractical due to the volume of clerical and administrative work that such a process would demand.

5. Written contracts are required when the City agrees to withhold monies from an employee's paycheck except when such withholding is statutory in nature (i.e., taxes, North Carolina Local Governmental Retirement System, North Carolina Firemen's Retirement System, Firemen's Benefit Fund) or when the withholding service is requested by an employee under one of the limited available investment withholding categories such as United States Savings Bonds or the Credit Union, or for the limited available charitable withholdings such as the United Way.

Current written contracts exist with the following companies, and these contracts may be reviewed at the City's Personnel office.

Company	*Program*	*Contract Location*	*Execution Date*
(1) Aetna Life Insurance Co.	Deferred Compensation	Personnel Department 600 East Trade Street Charlotte, N. C. 28202	June 11, 1973
(2) Life of Virginia	Life & Medical Insurance	Personnel Department 600 East Trade Street Charlotte, N. C. 28202	Dec. 1, 1967

6. Yes, except when withholding service is a statutory requirement. The forms may be reviewed at the City Attorney's office, 600 East Trade Street, Charlotte, N. C. 28202.

7. Each year since 1969 during the annual budget review period, the City Council has discussed and voted down proposals of Local 660, members of Local 660, or Fire Department employees to have union dues withheld or checked-off by the City.

8. List of witnesses have not been compiled and is unknown as of this date.

This the 17th day of December, 1973.

s/W. A. Watts

W. A. WATTS
Deputy City Attorney

(Jurat and certificate of service omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed February 1, 1974)

Plaintiffs, by and through their undersigned counsel, pursuant to Rule 56, Federal Rules of Civil Procedure, show the Court as follows:

1. This action was filed on October 2, 1973, and answer was filed by defendants on October 23, 1973.

2. Discovery thus far completed in this case demonstrates that there is no genuine issue with respect to any material fact herein. Plaintiffs respectfully refer the Court to the affidavits of R. L. Middleton and D. F. Black and Plaintiffs' First Interrogatories and the defendants' answers thereto filed herein.

3. Plaintiffs are entitled to Summary Judgment as a matter of law. Plaintiffs respectfully refer the Court to Plaintiffs' Memorandum In Support of Plaintiffs' Motion for Summary Judgment filed herewith.

WHEREFORE, plaintiffs move that they be granted Summary Judgment in their favor with respect to all issues raised

in the Complaint filed herein and that they be granted the relief prayed for in the Complaint.

Respectfully submitted,

/Jonathan Wallas

JONATHAN WALLAS
J. LEVONNE CHAMBERS
Chambers, Stein, Ferguson & Lanning
Suite 730 East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202
Attorneys for Plaintiffs

This 1st day of February, 1974.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed February 1, 1974

D. F. BLACK, being duly sworn, deposes and says:

1. That he is a plaintiff in this action, a fire fighter engineer in the Charlotte Fire Department, and Secretary of Local 660, International Association of Fire Fighters.

2. That, in his individual capacity and in his capacity as a member and officer of Local 660, he has attempted from time-to-time to have the defendants herein withhold or check-off on a regular basis, monies from his paychecks as dues to be paid directly to Local 660.

3. That sometime about 1970, he and other members of the Charlotte Fire Department and Local 660 submitted more than 300 authorization cards signed by more than 300 members of the Charlotte Fire Department each individually requesting dues check-off. These cards were submitted to Mr. Robert Earle, Personnel Director of the City of Charlotte, the designated representative of the City Manager. The request to have dues withheld or checked off was denied.

4. That during each succeeding year since 1970 he, both in an individual capacity and as an officer and member of Local 660, has attempted to have the defendants check-off

dues for the benefit of himself, other department members and Local 660. His request has been denied each year.

5. That, upon information and belief, other members of the Charlotte Fire Department and Local 660 have from time-to-time made similar requests for dues check-off which have been denied.

6. That, in recent months, Local 660 has begun negotiations to obtain a group life insurance plan for its members. Local 660 and its officers have been informed by two life insurance companies, Jefferson Standard Life Insurance Company and Vulcan Life Insurance Company, that they will be unable and unwilling to offer a group life insurance plan to Local 660 and its members until said members are afforded voluntary dues check-off by the City of Charlotte.

7. That the refusal of the defendants to withhold or check off dues as set forth hereinabove severely and materially impinges on his rights and the rights of other Fire Department employees and Local 660 to associate together for the purposes of, among other things, obtaining group life insurance and joining together for other lawful common purposes.

8. That upon information and belief, he is of the opinion and belief that the reason that the defendants have refused to allow dues check-off for himself, other members of the Fire Department and Local 660 is that the City desires to discourage the formation and ...lopment of Local 660 and other municipal labor unions.

s/D. F. Black

D. F. BLACK

(Jurat omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed February 1, 1974)

R. L. MIDDLETON, being duly sworn, deposes and says:

1. That he is a plaintiff in this action, a lieutenant in the Charlotte Fire Department, and President of Local 660, International Association of Fire Fighters.

2. That, in his individual capacity and in his capacity as a member and officer of Local 660, he has attempted from time-to-time to have the defendants herein withhold or check-off, on a regular basis, monies from his paychecks as dues to be paid directly to Local 660.

3. That sometime about 1970, he and other members of the Charlotte Fire Department and Local 660 submitted more than 300 authorization cards signed by more than 300 individual members of the Charlotte Fire Department each individually requesting dues check-off. These cards were submitted to Mr. Robert Earle, Personnel Director of the City of Charlotte, the designated representative of the City Manager. The request to have dues withheld or checked off was denied.

4. That during each succeeding year since 1970 he, both in individual capacity and as an officer and member of Local 660, has attempted to have the defendants withhold or check-off dues for the benefit of himself, other department members and Local 660. His request has been denied each year.

5. That, upon information and belief, other members of the Charlotte Fire Department and Local 660 have from time-to-time made similar requests for dues check-off which have been denied.

6. That, in recent months, Local 660 has begun negotiations to obtain a group life insurance plan for its members. Local 660 and its officers have been informed by two life insurance companies, Jefferson Standard Life Innsurance Company and Vulcan Life Insurance Company, that they will be unable and unwilling to offer a group life insurance plan to Local 660 and its members until said members are afforded voluntary dues check-off by the City of Charlotte.

7. That the refusal of the defendants to withhold or check-off dues as set forth hereinabove severely and materially impinges on his rights and the rights of other Fire Department employees and Local 660 to associate together for the purposes of, among other things, obtaining group life insurance and joining together for other lawful common purposes.

8. That he has been informed by City Manager, David Burkhalter, that the costs to the City of dues check-off for individual members of the Fire Department is negligible.

9. That, in addition to those organizations and agencies for which defendants withhold monies (See Answer to Plaintiffs' First Interrogatory No. 1), defendants also have arranged to deduct the per capita tax (dues) payable by members of the North Carolina State Fireman's Association in 1974 and

have distributed payroll deduction cards for that purpose. See Exhibit A attached hereto.

10. That, upon information and belief, he is of the opinion and belief that the reason that the defendants have refused to allow dues check-off for himself, other members of the Fire Department, and Local 660 is that the City desires to discourage the formation and development of Local 660 and other municipal labor unions.

s/R. L. Middleton

R. L. MIDDLETON

(Jurat omitted in printing)

EXHIBIT A

CITY OF CHARLOTTE
INTER-OFFICE COMMUNICATION

DATE: January 22 1974

FROM: W. O. Dowdy, Chairman
Firemen's Benefit Fund

TO: All Members
Charlotte Fire Department

SUBJECT: N. C. STATE FIREMEN'S ASSOCIATION DUES FOR 1974 (PER CAPITA TAX)

The Board of Directors of the Charlotte Firemen's Benefit Fund met this date with the following members present: Chief W. O. Dowdy, Captain R. E. Honeycutt, Captain John B. B. Prophet, Captain C. A. Butler, A. B. Caudle, and J. C. Beacham, and passed the following resolution: That the Benefit Fund underwrite the 1974 dues to enable Secretary to meet deadline for payment.

When letter was sent out some time back, it was a majority vote that each man be assessed in the amount of $3.00 in lieu of having our annual barbecue. This deduction will be made on March 29, 1974, payroll, which will be the fifth pay day in the month, when no hospitalization or group insurance are deducted.

CITY OF CHARLOTTE
INTER-OFFICE COMMUNICATION

DATE: January 22, 1974

FROM: John E. Lee, Chief
Fire Department

TO: All Members
Charlotte Fire Department

SUBJECT: PER CAPITA TAX DEDUCTION CARDS - 1974

Attached you will find a payroll deduction card in the amount of $3.00 to cover your Per Capita Tax for 1974. Payroll Department requires a signature from each member before deduction is made. Signature must be made on the reverse side of the card.

Membership cards have been secured from the N. C. State Firemen's Association and will be distributed as soon as the deduction cards are returned. It will be the responsibility of each company officer to see that these cards are distributed and returned to the General Office as soon as possible.

Please do not fold or mutilate cards.

28

D. F. Black

29

MEMORANDUM

(Filed February 5, 1974)

Date: February 1, 1974

To: C-C-73-236

From: Judge McMillan

Subject: Local 660, et al. v. City of Charlotte, et al.

This case was heard on February 1, 1974, on a pretrial conference and on the motions of defendants to dismiss.

All motions to dismiss are denied; since the only relief sought is equitable I believe the City may be retained as a party defendant and the question whether a claim is stated appears to be essentially a question of law rather than of fact.

Plaintiffs, a labor union and its officers, ask that the City be required to check off the dues of the individual plaintiffs and other members of Local 660. The theory is that the City is already making deductions from paychecks for some sixteen organizations, most of them not required by statute, and that the refusal of the defendants to deduct union dues is discrimination under the theory of the "Hair" cases and other similar decisions. Defendants say that contracts with labor unions are unlawful under G.S. 95-98, and that they should not be required to check off dues, there being no right to such a check off.

Plaintiffs have been requested to supply evidence as to the number of firemen in the Department and the number of firemen who belong to the union. Defendants have been requested to supply evidence or statutory authority indicating

which of the sixteen items now being checked off are required or authorized by state law.

After this information has been filed, the Clerk is requested to put the matter down for further hearing on the motions of defendants to dismiss and on plaintiffs' motion for summary judgment.

Office of the City Attorney 600 East Trade Street

CITY OF CHARLOTTE
Charlotte, North Carolina 28202

February 4, 1974

The Honorable James B. McMillan
U. S. District Court
Post Office Building
Charlotte, North Carolina

Re: Local 660, International Assoc. of Firefighters, et al.
v. City of Charlotte, et al. C-C-73-236

Dear Sir:

At our pre-trial conference on Friday morning consideration was given to defendants' position that a summary judgment should be entered in this case because of the following reasons:

1. Employees have no right to require the City to check-off union dues.
2. North Carolina General Statute 95-98 prohibits the check-off of union dues.
3. The City has not treated plaintiffs' union differently than other labor unions in that dues are not checked off or paid to any such organization.

In defendants' answer to plaintiffs' interrogatories filed on December 17, 1973, certain programs and purposes for which salary deductions were made were listed under Interrogatory No. 1, (a) through (n). You questioned the City's legal responsibility or authority for deducting for these programs.

We submit the following information:

(c) *North Carolina Firemens Retirement.*—Chapter 926 of the 1947 Session Laws of North Carolina, as amended, Section 1, states that if 75% of the members of the Fire Department elect by vote not to come under Article 3, Section 123, there shall be established in lieu thereof the Charlotte Firemen's Retirement System. Section 5 states that each "member shall pay and the City of Charlotte shall cause to be deducted from the salary of each uniformed member of the Charlotte Firemen's Retirement System, on each and every payroll of such employee and for each and every payroll period . . .". This is attached as Exhibit No. 1. This legislation does not permit the City to refuse to deduct in this instance.

(d) *North Carolina Local Government Retirement System.*—Section 128-23 of the N. C. General Statutes provides that the employer shall deduct from the salaries of employees who become members, their contribution. See Exhibit No. 2.

(m) *City-County tax levy and (n) State tax levy.*—N. C. G. S. 105-367, 368 permits the Tax Collector to serve a notice or levy of taxes due after which it is the duty of the City or employer to withhold wages and pay them over to the Tax Collector. See Exhibit No. 3.

You have also asked for a copy of the Attorney General's opinion stating that N. C. G. S. 95-98 prohibits dues check-off. The Attorney General takes the position that the City would be required to, in some fashion, contract with the union before dues could be checked off, and that any such contract would be illegal under the above statute. It is our opinion that a ruling requiring this City to check-off union dues would in effect nullify N. C. G. S. 95-98. Under such circumstances, we believe it appropriate that the N. C. Attorney General be permitted to intervene in this case. See Exhibit No. 4.

We have also pointed out orally that the City has entered into contracts with the insurance companies and wages are withheld for medical and life insurance policy payments, and with Ætna Insurance Company where salaries are withheld for savings. In the case of withholding for the Charlotte Employees' Credit Union, salaries withheld are not paid over to some other organization, but is deposited to the account of the employee. The only situation where there is a withholding of wages for the benefit of some other organization is when the employee asks that a charitable deduction be made for the United Way.

Plaintiffs have submitted that the State Firemen's Association is a union. However, this organization has no relationship to a union. It is set up under Chapter 118-10 of the N. C. General Statutes and the funds are a part of the Firemen's Relief Fund. See Exhibit No. 5.

We respectfully urge this Court that whether or not this union has a majority of the Charlotte firemen as its members makes no difference. However, we do not believe that a majority of the 530 firemen are members. Of course, we have no way of knowing the exact number of union members and we would urge the Court that the union be required to make available signed membership cards if this is to be a factor.

We hope the above has been responsive to the questions the Court has posed.

Sincerely,

W. A. Watts

W. A. WATTS
Deputy City Attorney

WAW:dbb

EXHIBIT 1

Chapter 926 of the 1947 Session Laws of North Carolina Establishing the Charlotte Firemen's Retirement System, as Amended.

An Act Exempting the Uniformed Employees of the Fire Department of the City of Charlotte from the Provisions of Article 3, Chapter 128 of the General Statutes of North Carolina of 1943 and Acts Amendatory Thereto, and Establishing the Charlotte Firemen's Retirement System.

* * *

SECTION 5. Method of Financing. Each member shall pay and the City of Charlotte shall cause to be deducted from the salary of each uniformed member of the Charlotte Firemen's Retirement System, on each and every payroll of such employee and for each and every payroll period, eight and thirteen hundredths per centum (8.13%) of his payroll earnings in payment thereof, and the City of Charlotte shall also contribute a sum equal to eight and thirteen hundredths per centum (8.13%) of said payroll earnings.***

EXHIBIT 2

Section 128-23 of the North Carolina General Statutes

§128-23. *Acceptance by cities, towns and counties.* (a) The governing body of any incorporated city or town may, by resolution legally adopted and approved by the board of trustees, elect to have its employees become eligible to participate in the Retirement System, and the said municipal governing body may make the necessary appropriation therefor and if necessary levy annually taxes for payment of the same.

* * *

(c) Any eligible employer desiring to participate in the Retirement System shall file with the board of trustees an application for participation under the conditions included in this article on a form approved by the board of trustees. In such application the employer shall agree to make the contributions required of participating employers, to deduct from the salaries of employees who may become members the contributions required of members under this article, and to transmit such contributions to the board of trustees. ***

EXHIBIT 3

Section 105-368 of the North Carolina General Statutes

§105-368. *Procedure for attachment and garnishment.*

* * *

(h) Tax collectors may proceed against the wages, salary, or other compensation of officials and employees of this State and its agencies, instrumentalities, and political subdivisions in the manner provided in this section. *** All deductons from the wages or salary of a taxpayer made pursuant to this subsection (h) and remitted to the tax collector shall, pro tanto, constitute a satisfaction of the salary or wages due the taxpayer.***

EXHIBIT 4

North Carolina Attorney General Reports — Volume 40
1968-70

25 July 1969

Subject: Public Officers & Employees; Labor Unions; Right of Authority of Municipal to Check-off Labor Union Dues for the Benefit of a Labor Organization Composed of its Employees

Requested by: Mr. H. Milton Short
Councilman of the City of Charlotte

Question: Can a municipal corporation or a city make deductions from the wages of its employees or operate a check-off for union dues of a labor organization or union composed of employees of a municipal corporation?

Conclusion: A municipal corporation or city cannot check-off or deduct union dues from the wages of its employees for the benefit of a labor union or organization composed of its employees.

The inquiry submitted by a councilman of the City of Charlotte is in essence a question of whether or not the City of Charlotte can operate a check-off of union dues for the benefit of a labor organization composed of its employees. It is assumed that this labor organization or union has for its membership city employees for if the city operates a check-off or deduction system it would have to be from the wages of its employees and it certainly would have no authority whatsoever in connection with the labor union whose membership is composed of employees other than city employees.

The assumption is made therefore that such is the case. In the case of *Atkins, et al and International Association of Fire Fighters and International Labor Union v City of Charlotte and the Chief of the Charlotte Fire Department, et al* (Civil No. 2274, Western District of North Carolina, Charlotte Division) a three-judge federal court decided that G.S. 95-97, which prohibited firemen from joining or organizing a labor unit, was void and constituted a deprivation of constitutional rights. As to the constitutional validity of G.S. 95-98 the three-judge federal court had this to say:

"We find nothing unconstitutional in G.S. 95-98. It simply voids contracts between units of government within North Carolina and labor unions and expresses the public policy of North Carolina to be against such collective bargaining contracts. There is nothing in the United States Constitution which entitled one to have a contract with another who does not want it. It is but a step further to hold that the state may lawfully forbid such contracts with its instrumentalities. The solution, if there be one, from the viewpoint of the firemen, is that labor unions may someday persuade state government of the asserted value of collective bargaining agreements, but this is a political matter and does not yield to judicial solution. The right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution. The State is within the powers reserved to it to refuse to enter into such agreements and so to declare by statute."

The provisions of G.S. 95-98 are as follows:

"Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.—Any agreement, or contract between the governing authority of any city, town, county or other municipality, or between any agency, unit,

or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect."

As you will see this section prohibits and forbids any agreement or contract between your city or municipality and any labor union or trade organization as bargaining agency for any public employees. This would be or amount to an agreement between you and the union and to check-off and pay over to the union the union dues from the wages of these employees of the City of Charlotte. Now, a check-off agreement whereby union dues are deducted from the employees' wages is a function or segment of collective bargaining. In the case of *National Relations Board v Reed and Prince Mfg. Co.*, 205 F.2d 131, 136, the United States Court of Appeals for the First Circuit said:

> "On the check-off proposal, the company registered its opposition, mainly on the ground that this was not a proper subject of collective bargaining. In this the company was mistaken."

Since the check-off agreement deals with a segment or functioning of collective bargaining with the labor union, it is expressly prohibited by G.S. 95-98 quoted above and the City of Charlotte has no authority of law and is expressly prohibited from operating or making any deductions or check-off from its employees' wages for the purposes of paying union dues or for that matter any other fee or assessments that pertain to the business of the labor union or labor organization. The city employees wanted a labor union or labor organization and the three-judge federal court said they could have it but the union will have to see to its own financing without the aid of the city for the city is prohibited by law from entering into any such agreement or exercising such assumed authority even in the absence of an agreement.

Robert Morgan, Attorney General

Ralph Moody,
Deputy Attorney General

EXHIBIT 5

Chapter 118 of the North Carolina General Statutes

Firemen's Relief Fund

Article I

Fund Derived from Fire Insurance Companies

§118-10. ***Fire department to be members of State Firemen's Association.***

*** [i]t is provided that every department enjoying the benefits of this law shall be a member of the North Carolina State Firemen's Association and comply with its constitution and bylaws. ***

Article 2.

State Appropriation

§118-12. ***Application of fund.*** The money paid into the hands of the treasurer of the North Carolina State Firemen's Association shall be known and remain as the "Firemen's Relief Fund" of North Carolina, and shall be used as a fund for the relief of firemen, members of such Association, who may be injured or rendered sick by disease contracted in the actual discharge of duty as firemen, and for the relief of widows, children, and if there be no widows or children, then dependent mothers of such firemen killed or dying from disease so contracted in such discharge of duty; ***

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed February 22, 1974)

ROBERT A. EARLE, being duly sworn, deposes and says:

That he is a citizen and resident of Mecklenburg County, North Carolina; that he is presently employed by the City of Charlotte as Personnel Director.

That he has reviewed the Memorandum in Support of Plaintiff's Motion for Summary Judgment filed with the Court on February 1, 1974, and specifically Paragraph 2 which states, "That the only persons denied dues check-off or withholding within the last ten years are individual Fire Department employees who requested that dues be checked off for the benefit of Local 660."

That he has reviewed records on file in his office and that he finds the following official requests for check-off have been made and been denied by the City Manager and/or City Council:

October 28, 1968—American Federation of State, County and Municipal Employees/AFL-CIO requested check-off of dues and this request was denied by City Council.

About June 10, 1969—American Federation of State, County and Municipal Employees/AFL-CIO and the Inter-

national Association of Fire Fighters/AFL-CIO requested check-off of dues and were denied.

About July 22, 1969—American Federation of State, County and Municipal Employees/AFL-CIO and the International Association of Fire Fighters/AFL-CIO again requested check-off of dues and were denied.

About January 26, 1970—American Federation of State, County and Municipal Employees/AFL-CIO and the International Association of Fire Fighters/AFL-CIO again requested check-off of dues and were denied.

June 22, 1970—North Carolina Labor Alliance asked for check-off and was denied.

February 1, 1971—Retail, Wholesale and Department Store Union asked for check-off and was denied.

February 1972—International Association of Fire Fighters/AFL-CIO asked for check-off of dues and was denied.

February 1973—International Association of Fire Fighters/AFL-CIO asked for check-off of dues and was denied.

Jaunary 1974—North Carolina State Firemen's Association requested assessment of $3.00 yearly dues check-off and was denied.

That as part of his duties as Personnel Director for the City of Charlotte he has been responsible for reviewing requests for the withholding of employees' pay for membership in unions and other employee organizations. That withholding employees' pay is considered to be a fringe benefit for employees and each request must be considered to determine whether or not all employees of the City of Charlotte would be benefited by the withholding, and whether or not such a benefit would outweigh the considerable administrative burden which would be imposed on the City. That whether or not

a specific withholding of pay is allowed is a matter for the Charlotte City Council. That in addition to the specific official requests for withholding and enumerated above, there have been numerous commercial organizations (i.e. insurance firms, etc.) concerning the possibility of having employees' pay withheld.

That there would be great and substantial administrative burden and responsibility imposed upon the City of Charlotte if the withholding of employees' pay should be allowed for any and every reason and without restriction.

This the 22nd day of February, 1974.

s/Robert A. Earle

ROBERT A. EARLE, Affiant

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed February 28, 1974)

D. F. BLACK, being duly sworn, deposes and says:

1. That he is a plaintiff in this action, a fire fighter engineer in the Charlotte Fire Department, and secretary of Local 660, International Association of Fire Fighters.

2. That on February 6, 1974 he telephoned the office of Assistant Chief Dowdy of the Fire Department and was told by Chief Dowdy's secretary that the Charlotte Fire Department, at that time, had a work force of 543 uniformed men.

3. That on February 4, 1974 he checked the membership list of Local 660 and determined that on that date there were 351 dues paying members of Local 660.

D. F. Black

D. F. BLACK

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

MOTION TO DISMISS

(Filed June 26, 1974)

NOW COME defendants, through their attorney W. A. Watts, and respectfully move the Court to dismiss this action purusant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, because the Court lacks jurisdiction over the subject matter.

These defendants request that this matter be advanced upon the docket and a speedy hearing held thereon.

Respectfully submitted this 26th day of June, 1974.

W. A. Watts

W. A. WATTS, Attorney for Defendants
600 East Trade Street
Charlotte, North Carolina 28202
(704) 374-2254

(Certificate of service omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

MOTION TO AMEND THE COMPLAINT

(Filed July 3, 1974)

Plaintiffs, pursuant to Rule 15, Federal Rules of Civil Procedure and 28 United States Code, Section 1653, hereby move the Court to amend Paragraph I of the Complaint heretofore filed in this action on October 2, 1973, to read as follows:

(a) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331 and 1343, this being a suit in equity authorized by law, Title 42, United States Code, Section1983,to be commenced by an citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a State of rights, privileges and immunities secured by the Constitution and laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by the First and Ninth Amendments and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. The amount in controversy exceeds $10,000.00 exclusive of interest and costs, in that the actions of the defendants have limited the plaintiffs, and each of them, in the exercise of constitutional rights thus limiting benefits which would accrue from the free exercise of said rights.

(b) Jurisdiction is further invoked under Title 28, United States Code, Sections 2201 and 2202, this being a suit for a declaratory judgment, declaring the unconstitutionality of the pattern and practice of the defendants in refusing to withhold or "check-off" union dues on behalf of Local 660, International Association of Fire Fighters.

This the 2nd day of July, 1974.

Respectfully submitted,

Jonathan Wallas

JOHNATHAN WALLAS
JULIUS LEVONNE CHAMBERS
Chambers, Stein, Ferguson & Lanning
951 S. Independence Boulevard
Charlotte, North Carolina 28202

(Certificate of service omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed July 8, 1974)

ROBERT A. EARLE, being duly sworn, deposes and says:

That he is a citizen and resident of Mecklenburg County, North Carolina; that he is presently employed by the City of Charlotte as Personnel Director.

That he is custodian of those records pertaining to the withholding of Charlotte city employees' pay; that he has searched his records and found that there has been no withholding of employees' pay and no payment turned over to any labor-type organization of employees' pay during the past 10 years.

That in order to withhold pay from Charlotte municipal employees for the benefit of a labor organization, it would be necessary for the Charlotte City Council to accord this right.

s/Robert A. Earle

ROBERT A. EARLE

(Jurat omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed July 25, 1974)

R. L. MIDDLETON, being duly sworn, deposes and says:

1. That he is a plaintiff in this action, a member of the Charlotte Fire Department, and President of Local 660, International Association of Fire Fighters.

2. That the current dues paid by members of Local 660 to said Union is $4.00 per month.

3. That if individual Fire Department members are allowed to have monies withheld from their paychecks and paid directly to Local 660, then he, as well as the other members of Local 660, will be able to engage in the following associational activities for their common betterment and for the betterment of the Charlotte community:

(a) The undersigned and other members of Local 660 will be able to purchase life insurance, health insurance, major medical insurance and other insurance which potentially may bring benefits to each of them and their families in excess of $10,000.00.

(b) The undersigned and other members of Local 660 will be able to join together to hire legal counsel for the bene-

fit of the Union and for the benefit of each of them individually.

(c) The undersigned and other members of Local 660 will be able to engage in various community service activities which will bring substantial benefit to the Charlotte community as well as to each of them individually.

(d) The undersigned and other members of Local 660 will be able to join together in numerous other associational activities which, by their nature and purpose, will provide substantial benefits, monetary and otherwise, for each of the members of Local 660.

(e) Local 660 will be able to pay a salary to its officers; thereby providing monetary benefits for paid officers while at the same time, increasing the effectiveness and value of the Union's associational activities.

s/R. L. Middleton

R. L. MIDDLETON

(Jurat omitted in printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed August 1, 1974)

DAVID A. BURKHALTER, being duly sworn, deposes and says:

That he is the City Manager for the City of Charlotte, and that he has been City Manager since May 10, 1971.

That as the City Manager, he is the chief administrative officer for the City. That it is one of the duties of the City Manager to carry out the policies of the City Council and be familiar with these policies both those which are written and those which are unwritten.

That he has knowledge of and is familiar with the Charlotte City Council's policy with respect to withholding of pay from employees' weekly paychecks. That he knows that it is the policy of the City Council to have withheld from employees' paychecks those withholdings which the law requires and are listed as follows:

1. Withholding for Federal Income Tax.
2. Withholding for State Income Tax.
3. Withholding for City/County tax levies.

4. Withholding for the North Carolina Firemen's Retirement System.

5. Withholding for the local government retirement system.

That in addition to those withholdings which are authorized and required by the laws of the Federal Government and the State of North Carolina, he knows that it is the policy of the Charlotte City Council to permit and authorize those deductions which would directly benefit all City employees, but that it is contrary to the policies of the Charlotte City Council to permit deductions which would benefit only some special group of employees.

That those deductions which benefit employees generally, which are in effect fringe benefits for employees, and in which the City participates and are authorized by the Charlotte City Council, are as follows:

1. Hospital and medical insurance.

The City has established and participates in a medical insurance plan for employees with Life of Virginia.

2. Group life insurance.

The City has established and participates in a plan for its employees with Life of Virginia; also a firemen's benefit fund with Lincoln National Life.

3. Savings plans, where a portion of the employee's pay is withheld for him at his request, and a deposit is made to the employee's account with the named credit union.

a. U. S. Savings Bonds (purchase of bonds is made for the employee).

b. All credit unions of which City employees are members.

c. AEtna Deferred Compensation Program.

4. Certain specific charities which are authorized by the City Council.

a. United Way.

b. Charlotte Fire Department Volunteer Pledge Fund.

That he knows it is the policy of the City Council to restrict withholdings from employees' pay to those classes described above because:

1. There would be a very substantial administrative burden to permit the withholding or deductions from employees' pay for any and all purposes; particularly if the City should be required to make deductions at the request of individual employees or groups of employees.

2. There would be a substantial expense to the City if employees could require the City to deduct and withhold from employees' pay any and all of the innumerable purposes which might arise.

That several requests have been made by other organizations and groups during the past 10 years, and these requests for withholding have been found to lack conformity with guidelines as set forth above, and these requests have been denied.

That the City has never held itself out to its employees as providing withholding of pay indiscriminately as a service to its employees.

This the 1st day of August, 1974.

s/David A. Burkhalter

DAVID A. BURKHALTER, Affiant

(Jurat and certificate of service omitted in printing)

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-73-236

Filed: Sept. 5, 1974

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, et al.,
Plaintiffs,

-vs-

THE CITY OF CHARLOTTE, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

(Printed at A-7 of the Petition for Writ of Certiorari)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73

(Filed September 12, 1974)

Notice is hereby given that the City of Charlotte, the Charlotte City Council, Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil C. Williams, defendants above named, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the final order entered in this action on September 5, 1974.

Office of the City Attorney

By: Henry W. Underhill, Jr.

HENRY W. UNDERHILL, JR.
Attorneys for Appellants
600 East Trade Street
Charlotte, N. C. 28202
704-374-2254

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed December 23, 1974)

ALLEN DUNCIL, being duly sworn, deposes and says:

1. About eighteen months ago, I contacted Robert Middleton, President of Local 660, IAFF, concerning the establishment of a group insurance plan for Local 660.

At that time, I was a representative for the Jefferson Standard Life Insurance Company in Charlotte, North Carolina. Since that time, I have severed my ties with Jefferson Standard so that I may represent several different companies simultaneously as opposed to just one. Early in 1974, I established my own firm in order to accomplish this end. My firm represents Manhattan Life Insurance Company of New York, New York, First Colony Life Insurance Company of Lynchburg, Virginia, Provident Life and Accident Company of Chattanooga, Tennessee, Georgia International Life Insurance Company of Atlanta, Georgia, and Continental Assurance Company of Chicago, Illinois. The name of my firm is Duncil and Company.

2. Since I first spoke with Mr. Middleton we have discussed the possibility of establishing a group life insurance

plan on several occasions. During this entire period of time, we have not been able to establish such a plan for the Professional Fire Fighters because they have no suitable way to collect the premium from their members. All companies including the above require a central billing point to collect the premium from the participants and mail one check to the insurance company in order to qualify for group insurance. In the case of Local 660, the central billing point for union members would most likely have to be the union itself.

3. Without the establishment of an acceptable central billing system, the only system which could be set up at the present time for the Professional Fire Fighters in Charlotte is a system of individual policies which would cost each member more money than the same coverage under group insurance, and under this type of system, each member would have to be individually underwritten which would cause many members who are older or who have health problems to not be able to receive such insurance.

4. Under the circumstances existing with Local 660 and its members, the only feasible method of establishing an acceptable central billing system would be through dues "check-off." If the members of Local 660 are allowed a "dues check-off" system, we will proceed to establish a group life insurance plan for its members which will probably be underwritten by Manhattan Life Insurance Company if they concur as they wrote one of the first group life insurance plans in the United States over 100 years ago and have the most favorable benefits and rates.

5. At the time I was representing Jefferson Standard Life Insurance Company, I could have written a group insurance plan for the members of Local 660 with Pilot Life Insurance Company, a subsidiary of the Jefferson-Pilot Corporation.

I made no formal proposal to Local 660 because I knew such a proposal would not be approved without dues check-off.

s/Allen Duncil

ALLEN DUNCIL

This the 19th day of December, 1974.

(Jurat omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

(Title omitted in printing)

AFFIDAVIT

(Filed December 23, 1974)

R. L. MIDDLETON, being duly sworn, deposes and says:

1. I am a plaintiff in this action and the President of Local 660.

2. About eighteen months ago I was contacted by Allen Duncil, an insurance agent. At that time I understood Mr. Duncil represented Jefferson Standard Life Insurance Company and Duncil gave to me his business card, a copy of which is attached hereto and incorporated herein as Exhibit A. Mr. Duncil and I, as well as other members of Local 660, have subsequently discussed obtaining a group life insurance program for members of Local 660 on several occasions. During these discussions, I was under the impression Mr. Duncil was still a representative for Jefferson Standard Life Insurance Company.

3. In reviewing the possibility of establishing a group life insurance plan with Mr. Duncil, we concluded the only feasible method by which the members of Local 660 could obtain insurance at favorable rates was if the unions' members were granted dues check-off.

4. It has always been understood by me that if the members of Local 660 could obtain dues check-off, Mr. Duncil would be willing to obtain a group policy for union members. I assumed Mr. Duncil represented Jefferson Standard Life

Insurance Company because of the business card (Exhibit A) given to me by him.

5. During the past two or three years I have spoken to representatives of Vulcan Life Insurance Company, whose names I do not remember, about a group life insurance program for members of Local 660. We discussed at that time payment of premiums through deductions through credit unions and through dues check-off. It was my opinion and understanding from discussions with the Vulcan representatives that the only manner in which Vulcan could feasibly write a group policy for Local 660's members was if a dues check-off system was obtained by the members of Local 660.

6. It is still my understanding that if the members of Local 660 can obtain dues check-off we will be able to obtain a group life insurance policy from one of the firms Allen Duncil represents or from some other firm. It is my further understanding that there is no feasible manner other than a dues check-off system by which the members of Local 660 will be able to obtain group life insurance at favorable rates.

7. I have not misrepresented the facts in affidavits I have filed in this case. I have assumed Allen Duncil represented Jefferson Standard Life Insurance Company and that he was planning to write group insurance with that Company. It now appears that Mr. Duncil could have obtained a group insurance policy from a subsidiary of Jefferson Standard if the members of Local 660 had obtained a dues check-off system from the defendants.

R. L. Middleton

R. L. MIDDLETON

This the 20th day of December, 1974.

(Jurat omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2240

No. 74-2241

No. 75-1126

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, et al.,

Plaintiffs-Appellees

vs.

CITY OF CHARLOTTE, et al.,

Defendants-Appellants

(Opinion printed at A-3 of the Petition for Writ of Certiorari)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2240

Local 660, International Association of Firefighters, an unincorporated labor organization, et al.,

Appellees,

versus

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, et al.,

Appellants.

(Order for Stay printed at A-1 of the Petition for Writ of Certiorari)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-250

CITY OF CHARLOTTE, a municipal corporation, the CHARLOTTE CITY COUNCIL, the governing legislative body of the City of Charlotte, and FRED ALEXANDER, JAMES WHITTINGTON, MILTON SHORE, JOE WITHROW, PAT LOCKE, KENNETH R. HARRIS, and NEIL G. WILLIAMS, as members of the Charlotte City Council and individually,	)
Petitioners,	)
v.	)
LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, an unincorporated labor organization, and R. L. MIDDLETON, W. M. BRAWLEY, D. F. BLACK, M. L. KNIGHT and R. D. McCALL, as officers of Local 660 and individually,	)
Respondents.	)

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondents herein, R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight, and R. D. McCall, ask leave to file the Brief for Respondents in Opposition in the above-captioned matter previously mailed and received by this Court on or about September 12, 1975 without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 53.

The respondents' affidavits in support of this Motion have previously been forwarded to the Court.

Local 660, International Association of Firefighters ("Local 660"), was dismissed as a party plaintiff by the district court below. That dismissal was affirmed by the Court of Appeals For The Fourth Circuit. In any event Local 660 is without funds to pay the costs in this action, especially the costs of printing necessary briefs. Respondents have sought financial aid from the parent International union but have thus far been unsuccessful in obtaining necessary funding.

Respectfully submitted,

Jonathan Wallas

JONATHAN WALLAS
J. LeVONNE CHAMBERS
Chambers, Stein, Ferguson & Becton
Suite 730 East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202

Telephone No. (704) 375-8461

Counsel for Respondents.

SEP 12 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil C. Williams, as members of the Charlotte City Council and individually,

Petitioners,

v.

Local 660, International Association of Firefighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight and R. D. McCall, as officers of Local 660 and individually,

Respondents.

A F F I D A V I T

I, R. L. MIDDLETON, being duly sworn according to law, depose and say, in support of respondents' Motion for Leave to Proceed In Forma Pauperis, as follows:

1. I am one of the respondents in the above titled action. I am also the President of the respondent labor union, Local 660, International Association of Firefighters.

2. I am familiar with the financial status of Local 660 and said labor union, because of its financial situation and poverty, is unable to pay the costs of this action, especially the costs of printing necessary briefs.

3. Local 660 is unable to give security for the payment of the costs in this action.

4. Because of my poverty, I am unable to pay the costs of this action, especially the printing of necessary briefs.

5. I am unable to give security for the costs of this action.

6. I have discussed this action with my attorneys, and I believe that my position in this action is correct and just and that the respondents are entitled to prevail herein.

This action involves the respondents' attempts to be free from the arbitrary and capricious actions of the petitioners who have refused to withhold monies for the benefit of the respondents and their chosen labor organization when the petitioners regularly withhold money for the benefit of all other organizations and causes. Respondents have prevailed on the merits in this action in the United States District Court for the Western District of North Carolina, Local 660 v. City of Charlotte, 381 F. Supp. 500 (W.D.N.C., 1974) and in the United States Court of Appeals for the Fourth Circuit, Local 660 v. City of Charlotte, __F.2d__, 89 LRRM 2608 (4th Cir., June 17, 1975).

R. L. Middleton

Subscribed and sworn to before me

this 6th day of September, 1975.

Notary Public

My Commission Expires: 8-23-76

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-250

RECEIVED
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SUPREME COURT, U.S.

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil G. Williams, as members of the Charlotte City Council and individually,

Petitioners,

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Local 660, International Association of Firefighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight, and R. D. McCall, as officers of Local 660 and individually,

Respondents.

****

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

****

BRIEF FOR RESPONDENTS IN OPPOSITION

****

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J. LeVONNE CHAMBERS
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Charlotte, North Carolina 28202

Counsel for Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil G. Williams, as members of the Charlotte City Council and individually,

Petitioners,

v.

Local 660, International Association of Firefighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight, and R. D. McCall, as officers of Local 660 and individually,

Respondents.

****

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

****

BRIEF FOR RESPONDENTS IN OPPOSITION

****

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at ___F.2d ___, 89 LRRM 2608 (4th Cir. 1975). The opinion and order of the United States District Court for the Western District of North Carolina is reported at 381 F. Supp. 500 (W.D.N.C., 1974). Copies of these opinions are appended to the Petition at pp. A-3 to A-14.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on June 17, 1975. Petitioners invoke jurisdiction of this Court under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the court below erred in holding that petitioners violated the First and Fourteenth Amendment rights of the respondents in denying them the right to assert their associational and economic rights by having moneys withheld for their benefit on the same basis moneys are withheld for the benefit of other organizations and for other purposes?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Constitutional provisions (Amendments I, IX and XIV) and the pertinent statutes involved (28 U.S.C. §1331, 28 U.S.C. §1343, 42 U.S.C. §1983 and N.C.G.S. §95-98) are set forth in the Petition at pp. 2-7.

STATEMENT

This litigation brings before this Court the effort of the individual respondents to obtain equal and fair treatment with respect to the withholding of money from their paychecks to be paid for their benefit to Local 660, International Association of Firefighters (hereinafter "Local 660"), in the same manner moneys are withheld by the petitioners for other organizations and other purposes. The court below found that the petitioners' refusal to treat respondents equally and fairly constituted arbitrary and standardless state action which infringed the

First and Fourteenth Amendment rights of respondents to obtain, inter alia, life insurance on a favorable group basis and to retain legal counsel. (Petition at pp. A-5, A-9 to A-11) In addition, the court below found that petitioners had not followed their alleged standard, asserted again in this Court (Petition at p. 9), that they adhere generally to a policy of refusing withholding requests unless the requested withholding is available to all employees. (Petition at pp. A-5, A-10 to A-11). The evidence indicates that of the fourteen purposes for which withholding is now allowed by petitioners (Petition at p. A-10), only six are required by statute (i.e., State and Federal Income Taxes, North Carolina Firemen Retirement, North Carolina Local Government Retirement System, and the City-County and State Tax Levies). Contrary to the alleged standard asserted by the petitioners that a withholding must benefit all employees, certain purposes for which withholding has been granted can be utilized by only some City employees (e.g., Firemen Benefit Fund, the Charlotte Fire Department Credit Union, and Charlotte Fire Department Voluntary Pledge Fund). With respect to certain other purposes for which withholding is allowed (e.g., United States Savings Bonds, United Way, and deferred compensation) all employees can voluntarily opt in or out of the particular program.

Presented with evidence of arbitrary and standardless state action effecting substantive Constitutional rights, the court below issued limited relief to enjoin the impermissable action found (Petition at pp. A-6, A-14).

ARGUMENT

I. This Petition Presents No Important Issue Worthy of Review By This Court.

Respondents submit that this action presents no special or important reason which would make this case proper for the granting of a writ of certiorari. There is no conflict among the circuits with respect to the issues litigated herein and no statute, state or federal, has been declared unconstitutional. The result reached below does not turn on any unsettled federal constitutional questions. Rather, the court below invoked constitutional principals and correctly applied them to the particular factual situation presented herein. This action is not one involving "forced collective bargaining". The case simply presents the question whether the constitutional rights of the respondents have been infringed by the arbitrary actions of the petitioners. The limited relief granted to respondents below is wholly consistent with the law and the exercise of sound judicial discretion.

II. The Decision Rendered Below is Correct.

Assuming arguendo an issue worthy of review in this Court is presented by the Petition, this Court should decline to grant the Petition because all factual and legal issues were correctly decided below.

A. Respondents have First Amendment Associational Rights.

The right of association is now clearly established as a freedom deeply embodied in the First and Fourteenth Amendments. As this Court stated in Healy v. James, 408 U.S. 169, 182 (1972):

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition. (citations omitted)

See also, NAACP v. Alabama, ex. rel. Patterson, 357 U.S. 449, 461 (1958); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969). Among other things, the First Amendment protects associational activities designed to provide economic benefits for an association's members, including activities designed to obtain legal counsel as asserted herein. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); United Mineworkers v. Illinois Bar Association, 389 U.S. 17 (1967); United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971).

B. Respondents have been treated unequally and unfairly by the petitioners.

Respondents' First Amendment rights have been infringed by the special, albeit deleterious, treatment afforded them by the petitioners. Only the respondents have been denied their withholding requests in the Fire Department. (Petition at p. A-10)

Just as the First and Fourteenth Amendments prohibit a state from allowing only "popular" organizations to use public auditoriums and parks for meeting and discussion purposes, the Constitution prohibits petitioners from selectively and arbitrarily denying to the respondents, under the facts of this case, the right to have funds withheld for the organization of their choice. See, e.g., National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973); Southeastern

Promotion, Ltd. v. City of West Palm Beach, 457 F.2d 1016, 1019 (5th Cir. 1972).

Contrary to the assertion of petitioners (Petition at p. 17), the relief granted by the court below did not constitute an incursion into the collective bargaining arena. It is the standardless refusal of the petitioners to treat the respondents in the same manner others are treated which gives rise to the constitutional violation found below.

Just as states and municipalities have "dedicated" public auditoriums for the dissemination of ideas, petitioners have arbitrarily allowed certain groups to benefit from withholding. See, Danskins v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885 (Cal. 1946). Petitioners are not required to offer withholding for any purpose not specifically required by statute (Petition at p. A-12). However, once undertaking to provide such a service, petitioners may not discriminatorily select the receipients of municipal benefits. Griffin v. School Board of Prince Edward County, 377 U.S. 218, 231 (1964).

C. Petitioners have offered no compelling State interest or rational basis for their discriminatory treatment of respondents.

Petitioners claimed standard, that withholding is allowed for the benefit of an organization only when the withholding will be beneficial to all city employees, has not been followed in practice. Indeed, this alleged standard was only asserted well after the commencement of this litigation. Since the standard has not been followed and no other permissable reason advanced, the court below properly concluded that petitioners' actions were arbitrary and standardless.

Petitioners have failed to demonstrate that their infringement of respondents' First Amendment rights is compelled by any state interest or is grounded in any rational basis. See generally, NAACP v. Button, 371 U.S. 415 (1963), Dunn v. Blumstein, 405 U.S. 330 (1972). The equal protectional clause requires not necessarily that a statute or policy be applied with exact equality to all persons; however, in defining a class subject to legislation, distinctions that are drawn must have at least some relevance or rational basis to the purpose for which the classification is made. Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1965). No such showing has been made in this action. 1/

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Jonathan Wallas

JONATHAN WALLAS
J. LeVONNE CHAMBERS
Chambers, Stein, Ferguson & Becton
Suite 730 East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202

Counsel for Respondents

1/ Questions 3 and 4 asserted by petitioners (Petition at p. 3) are frivolous. N.C.G.S. §95-98 does not prohibit contracts between individuals and municipalities. No contract is required in this case between the City and Local 660 (Petition at pp. A-6, A-13). Finally, the question of whether factual findings are supported by the evidence (Question 4) does not present a proper question for this Court. Rule 19, Rules of the Supreme Court of the United States.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil G. Williams, as members of the Charlotte City Council and individually,

Petitioners,

v.

Local 660, International Association of Firefighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight and R. D. McCall, as officers of Local 660 and individually,

Respondents.

RESPONSE TO RESPONDENTS' MOTION TO PROCEED IN FORMA PAUPERIS

Respondents (hereinafter referred to as "applicants"), have filed a motion for leave to proceed in forma pauperis with accompanying affidavits in support of their motion stating that because of their poverty, they are unable to pay the costs of this action or give security for the costs.

Petitioners strongly oppose this motion on the grounds that the affidavits fail to show the financial condition of the applicants and are therefore insufficient. It is admitted that the affidavits do follow the language of the statute (28 U.S.C. §1915), and nothing else appearing, would possibly be sufficient. However, by

an affidavit attached hereto as Exhibit "A", petitioners respectfully show the Court that the applicants moving to proceed in forma pauperis are presently employed by the City of Charlotte in the Fire Department at a regular weekly salary, and have been so employed for a number of years. It is difficult to believe that persons with such a long tenure of employment and currently employed at the salaries shown in Exhibit "A", could possibly be considered by the courts to be indigent unless extenuating circumstances exist. If such conditions do exist, then for the Court to make a determination of indigency, it would be necessary for it to have detailed information as to the financial status of each applicant. The applicants' affidavits presently before this Court merely state that because of their poverty, they are unable to pay the costs of this action, especially the printing of necessary briefs, and that they are unable to give security for the costs.

It is respectfully contended by petitioners that the Court in this case should have more complete financial information regarding these applicants, as well as an estimation of the expected costs. In order to determine if an article or service desired is beyond one's financial reach, then one's net worth, income and the price of the item must all be considered.

In Ward v. Werner, 61 F.R.D. 639 (1974) at page 640, the Court in discussing in forma pauperis proceedings said: "There exists no fixed net worth which disqualifies a party as a pauper. U. S. v. Scharf, 354 F. Supp. 450, Carroll v. U.S., 320 F. Supp. 581. Yet, the mere assertion of poverty does not serve as a

substitute for indigency."

The decision to allow motions in forma pauperis is discretionary and the Court in order to make this decision should have complete information as to the applicant's ability to pay or the public will be burdened with expenses it should not have to bear. The Court in Dreyer v. Iolet, 349 F. Supp. 452 (1972) said that "[i]n order to preclude fraudlent or careless motions of poverty, the applicant moving for in forma pauperis status should state 'with some particularity, definiteness and certainty' the facts as to his poverty. Iefferson v. U. S., 277 F.2d 723, 725, (9th Cir.), certiorari denied 364 U.S. 896, 81 S.Ct. 227, 5 L. Ed. 2d 190 (1960)."

In discussing the difficulty in defining indigence in In re Smith, 323 F. Supp. 1082 (1971) at page 1091, the Court stated: "The Supreme Court has not to our knowledge ever defined the term, although the Court has used it in literally thousands of decisions. It is true that the Supreme Court and numerous lower courts have construed the meaning of indigence as used in the federal in forma pauperis statute, 28 U.S.C. §1915 (1964) ... but these cases are not much help in defining indigence in the constitutional sense. E.g., Adkins v. E. I. DuPont, 335 U.S. 331, 69 S.Ct. 85, 93 L.Ed. 43 (1948); [1] Samuel v. U.S. 420 F.2d 371 (5th Cir. 1969)."

1/ In the Adkins case, the only questions presented related to the sufficiency of the affidavits in the two courts below. E.g., excessive costs, the requirement of attorneys representing the litigant to make affidavits of poverty and the ability of the courts to control the inclusion of unnecessary matters in appeals. In order to reach these more important questions, the affidavits were accepted as sufficient. 69 S.Ct. 85 at page 88.

The Court went on to say that the decision in Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969), though avoiding a general definition, listed several factors which it thought relevant in determining whether a person is indigent for the purpose of being entitled to counsel in a criminal case:

> "The determination of indigency rests in the sound discretion of the court but it should take into consideration whether the accused has a family or other dependents and how many, if the accused is presently employed or is on welfare, whether he has an income while he is in custody, what amount, if any, he has in checking or savings accounts, the extent of any indebtedness, whether he is incarcerated or free on bond and whether he has adequate assets not presently encumbered or otherwise available." 307 F. Supp. at 1323. In re Smith, supra.

If the above factors were considered necessary to determine indigency in a criminal matter, then surely they would be necessary in a civil matter as the one before this Court.

In making a determination that the requisite is present in forma pauperis, there is no "magic formula", but a careful scrutiny and weighing of all the relevant facts and circumstances involved is required. Dreyer v. Jolet, supra.

Petitioners are aware that the privilege of proceeding in forma pauperis should not be reserved for the destitute, and that a person should not be required to deny his family the necessities of life to maintain a suit, but the mere statement that a man is "poor" is not sufficient to be allowed to proceed in this manner.

It is respectfully urged that Respondent-applicants' motion to proceed in forma pauperis should be denied unless they submit

to this Court sufficient financial information as to income, land holdings, dependency, encumbrances on available resources and checking and savings accounts. We respectfully contend that until the Court receives this information on each applicant, there is no objective basis for determining indigency in this case.

Respectfully submitted,

Henry W. Underhill Jr.

HENRY W. UNDERHILL, JR.

W. A. Watts

W. A. WATTS
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City of Charlotte
600 E. Trade Street
Charlotte, North Carolina 28202

Telephone: (704) 374-2254

Counsel for Petitioners

-5-

NORTH CAROLINA

MECKLENBURG COUNTY

EXHIBIT 'A'

AFFIDAVIT

NOW COMES Robert A. Earle, who being first duly sworn, says:

1. That he is a resident of Mecklenburg County and the Personnel Director for the City of Charlotte.

2. That as Personnel Director he is the custodian of the personnel records of the employees of the City of Charlotte.

3. That the following information relative to the five respondent-applicants' employment and job classification and salary range is a part of their personnel record:

Employee	Job Title	Emp. Date	Weekly Salary	Annual Salary
R. L. Middleton	Lt.-Captain	10/8/62	$252.85	$13,148
W. M. Brawley	Lt.-Captain	4/16/58	$278.75	$14,495
D. F. Black	Lt.-Captain	3/01/57	$240.81	$12,522
M. L. Knight	Lt.-Captain	3/07/55	$278.75	$14,495
R. D. McCall	Firefighter-Engineer	3/07/55	$229.35	$11,926

Further the affiant sayeth not.

This the 19th day of September, 1975.

Robert A. Earle

Robert A. Earle
Affiant

Sworn to and subscribed before me

this 19th day of September, 1975.

Dolores B. Ballard

Notary Public

My Commission Expires: 6-15-76

Supreme Court, U. S.
FILED
NOV 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil C. Williams, as members of the Charlotte City Council and individually,

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v.

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Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1975

75-250

CITY OF CHARLOTTE, et al.,

Petitioners,

v.

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

This Case raises the question whether a municipality is required, under the Fourteenth Amendment, to grant union dues check off to city employees who are members of a labor union, absent State or Federal legislation requiring it.

The questions presented involve whether the municipality has established a rational basis for denying dues check off, while permitting voluntary payroll deductions for programs considered to be employee fringe benefits.

This Case concerns the lower courts' application of the Equal Protection Clause of the Fourteenth Amendment to the denial, by a municipality, of union dues check off.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Order of the United States District Court for the Western District of North Carolina is reported in 381 F. Supp. 500. The opinion of the U. S. Court of Appeals for the Fourth Circuit was entered on June 17, 1975 and is not reported. Copies of these opinions are appended to the Petition for Writ of Certiorari filed August 16, 1975.

JURISDICTION

This suit was brought under Title 28 of the United States Code, Sections 1331 and 1343 authorized by Title 42 U.S.C. 1983 for mandatory injunctive relief, and alleged violation of the First, Ninth and Fourteenth Amendments of the U. S. Constitution. This action was file in the District Court on October 2, 1973 (App. 3). The District Court granted summary judgment to plaintiffs [respondents in instant case], stating the Fourteenth Amendment applied under the facts of the case (A-13, Petition for Certiorari). On September 12, 1974, defendants [petitioners in instant case], noted their appeal in District Court (App. 57) and applied for a stay to the U. S. Court of Appeals for the Fourth Circuit. A stay of the mandates was granted pending application for certiorari to the U. S. Supreme Court (A-2, Petition for Certiorari). The jurisdiction of the U. S. Supreme Court was invoked under 28 U.S.C.A. 1254(1). Petition for certiorari was filed August 16, 1975 and certiorari was granted October 14, 1975.

QUESTIONS PRESENTED

1. Whether it is mandatory for a municipality to grant union dues check off, absent a statute requiring it, and whether denial thereof is a violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the City of Charlotte has established a rational basis for denying dues check off to City-employed firemen who are members of a labor union.

3. Whether North Carolina General Statute §95-98, which prohibits agreements between North Carolina municipalities and labor unions as bargaining agents for any public employee, would preclude the City of Charlotte from granting union dues check off.

4. Whether the findings of fact affirmed by the U. S. Court of Appeals for the Fourth Circuit were supported by the evidence.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Amendments to the U. S. Constitution involved in this case are the First Amendment cited in Volume I, page XLVI of the U. S. Code, the Ninth Amendment cited in Volume I, page XLVII of the U. S. Code, and the Fourteenth Amendment cited in Volume I, page XLVII of the U. S. Code which provide as follows:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Jurisdiction at the District Court level was invoked under 28 U.S.C., Sections 1331 and 1343, and Title 42 of the U. S. Code, Section 1983 which provide as follows:

28 U. S. Code 1331

(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U. S. Code 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any

right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U. S. Code 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.

The statute of the State of North Carolina which is involved in this case is cited in Volume 2C, Section 95-98 at page 689 of the General Statutes of North Carolina which provides as follows:

North Carolina General Statute 95-98

Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or

agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect.

STATEMENT OF THE CASE

This controversy arises out of a claim by City-employed firemen that the City of Charlotte and its Council members have, on request, approved payroll deductions from their wages for insurance payments, savings plans and charitable contributions, but have arbitrarily refused to allow dues check off for the benefit of their union.

In granting Respondents' Motion for Summary Judgment, the U. S. District Court for the Western District of North Carolina ruled that so long as the City and its Council continued, without clearly stated and fair standards, to withhold money(s) from the paychecks of employees for purposes, organizations and entities not specifically required by law, the City was enjoined from denying dues check off to the firemen to be paid to Local 660, International Firefighters Association (A-14, Petition for Certiorari).

On appeal, the U. S. Court of Appeals for the Fourth Circuit affirmed the decision of the District Court (A-6, Petition for Certiorari).

STATEMENT OF THE FACTS

Petitioners in this case are the City of Charlotte, the Charlotte City Council, and members of the City Council as such and individually, (hereinafter referred to as the "City").

Respondents are City-employed firemen serving as officers of Local 660, International Firefighters Association, an unincorporated labor organization, and individually, (hereinafter referred to as "Union Officers").

Since 1970, a majority of the City's uniformed firemen have been members of Local 660. In February of 1974, 351 of the 543 uniformed firemen were dues-paying members of the union (App. 46). Local 660 and the Union Officers have requested dues check off from the City almost every year since 1969 until the time of this action (App. 43, 44). Their requests have been denied because dues check off does not fall within the guidelines of the City's policy regarding payroll deductions (App. 55). Since 1968, the City has consistently denied dues check off requests to three other labor organizations and the North Carolina State Firemen's Association. Numerous commercial organizations have also been refused payroll deductions (App. 43-45).

The Attorney General of North Carolina rendered an opinion to a City Councilman in 1969 that dues check off was a segment of a collective bargaining agreement with a labor union; therefore the City was expressly prohibited by North Carolina General Statute 95-98 from making any check off from its employees' wages for the purpose of paying union dues (App. 38-41, Ex. 4).

In addition to the payroll deductions required by Federal and State law, it is the policy of the City to permit payroll deductions which directly benefit all City employees (App. 54). The City has also permitted payroll deductions for employees within the Fire Department for the Firemen's Credit Union, Firemen's Benefit Fund-Lincoln National Life and the Firemen's Voluntary Pledge Fund (App. 16, 17). Withholding of employees' wages is regarded as a fringe benefit, and each request for withholding is considered in order to determine whether or not City employees would be benefited by the deduction, and whether such a benefit would outweigh the administrative burden and expense which would be imposed on the City. Without some restriction, this burden would be substantial (App. 44, 45).

In accordance with its policy, the City permits payroll deductions for the following items: (App. 16, 17)

(a) Federal income tax (required by law)
(b) State income tax (required by law)
(c) North Carolina Firemen's Retirement System (required by law) (App. 33, Ex. 1, 35)
(d) North Carolina Local Government Employees' Retirement System (required by law) (App. 33, Ex. 2, 36)
(e) Medical Insurance (App. 18—Contract)
(f) Life Insurance (App. 18—Contract)
(g) U. S. Savings Bonds
(h) United Way—Mecklenburg-Union Counties (App. 18)
(i) Firemen's Benefit Fund—Lincoln National Life Insurance
(j) Firemen's Credit Union
(k) AEtna Deferred Compensation Plan (App. 34)
(l) Fire Department's Voluntary Pledge Fund (Petition for Certiorari p. 9)
(m) City-County tax Levy (required by law Ex. 3, App. 37)
(n) State tax levy (required by law Ex. 3, App. 37)

Some time during 1973, Local 660 and the Union Officers began negotiations to obtain a group life insurance plan for its members. The Union Officers alleged that two life insurance companies so contacted advised they would be unwilling and unable to offer such a plan until the union members were afforded voluntary dues check off by the City of Charlotte (App. 23, 25).

The Union Officers, as City employees and firemen, already have a medical insurance plan and two life insurance plans available to them (App. 16 (e), (f), and (i)).

In October of 1973, the Union and its officers filed a complaint in the U. S. District Court, alleging that the City and its Councilmen have engaged in a pattern and practice of refusing to check off union dues from Local 660 members who are employees of the City Fire Department, while withholding moneys from Fire Department employees for such items as insurance payments and charitable contributions. Local 660 and its officers alleged that this arbitrary and capricious practice violated their rights under the First Amendment to the U. S. Constitution to freedom of speech, freedom of assembly, including their rights to organize, petition and bargain for rights and privileges of employment; and also violated rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment (App. 5). It was further alleged that the failure to allow dues check off by the City impinged on their rights to associate together for the purpose of obtaining group life insurance and retaining legal counsel (App. 25, 51).

The City denied that its refusal to grant union dues check off was a violation of any constitutional provision, but instead was an exercise of sound discretion inherent in a municipality and its governing body. The City further denied that the classification of items which might be deducted from employees' wages was arbitrary or capricious, but was a reasonable classification of deductions which might be made from employees' pay (App. 8, 10).

All parties filed motions for dismissal and for Summary Judgment.

Union Officers presented evidence that the current union dues were $4.00 per month, and if union members were allowed check off, they would be able to purchase life, major medical and other insurance, hire legal counsel, join together in other associational activities for the betterment of the community and pay its officers a salary (App. 51, 52).

On September 5, 1974, the District Court entered its Findings of Facts, Conclusions of Law and Order. The Court found that refusal of the City to check off money for the benefit of Local 660 when requested to do so by the union members, constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. Local 660 was dismissed as a party plaintiff as the Fourteenth Amendment applied only to the individual union officers (A-12, A-13).

The Court found further that, although the City had no written guidelines, it had established a practice of allowing withholding of payroll deductions when the benefit was available to all employees and employees within a single unit such as the Fire Department. The City was enjoined from refusing to check off dues so long as the City, without clearly stated and fair standards, withheld moneys from paychecks of City employees for other purposes and organizations not specifically required by law (Petition for Certiorari, p. A-10, A-14).

On appeal, the U. S. Court of Appeals for the Fourth Circuit affirmed the decision of the District Court (Petition for Writ of Certiorari, p. A-3).

A stay of the mandates was granted pending application of the City for a Writ of Certiorari to this Court (Petition for Writ of Certiorari, A-1).

Petition for certiorari was filed on August 16, 1975, and certiorari was granted on October 14, 1975.

SUMMARY OF ARGUMENT

Union dues check off has historically been considered a negotiable item in a collective bargaining agreement between an employer and a labor union. Absent a statute requiring check off, a municipality is not required to grant dues check off to municipal employees who are union members.

The lower courts' application of the Equal Protection Clause of the Fourteenth Amendment to the granting of

union dues is erroneous and in effect, creates a substantive right having no constitutional foundation. Refusing to permit dues check off to the Union Officers does not deprive them of any constitutionally-guaranteed right, and therefore is not a violation of any constitutional provision. Dues check off is a privilege which may be bestowed or withdrawn by an employer, even a public employer, for there is no state or federal legislation requiring it.

Nevertheless, the City has established a policy with respect to voluntary payroll deductions which satisfies the constitutional requirements for rational classification.

The decision in this case will have a far-reaching effect in the field of employer-employee relations and labor negotiations in all parts of the United States.

ARGUMENT

I. It is not Mandatory for a Municipality to Grant Dues Check Off, Absent a Statute Requiring It, Nor is Denial Thereof a Violation of the Equal Protection Clause of the Fourteenth Amendment.

The question raised by the Union Officers who are the respondents in this case, has never, insofar as the City can determine, been considered by this Court. It is simply whether municipal employees who are union members have a substantive right to dues check off because their employer has a policy of permitting voluntary withholding of wages for insurance premiums and similar purposes as employee fringe benefits.

A. Dues Checked Off is a Privilege—Not a Constitutionally Protected Right.

The District Court in deciding this case concluded that the Union Officers have no right *per se* to have moneys withheld

from their paychecks for the benefit of Local 660, but once the City offered the benefits of withholding to certain organizations and entities, then under the Fourteenth Amendment, the City must administer the program in a fair and equitable manner (A-12, Petition for Writ of Certiorari). The Court has, by this decision, given constitutional protection to dues check off, thereby creating a substantive right. Check-off is a privilege to be bestowed or withdrawn. Even Congress, in enacting the National Labor Relations Act, made dues check off a matter of negotiation between the parties, and not mandatory.

The U. S. District Court for the Southern District of Georgia considered this subject in *Strojny v. Rousakis,* 88 L.R.R.M., 2458 (1974), where firemen employed by the City of Savannah brought suit against the Mayor and Aldermen for withdrawing check off privileges. The suit was brought under 42 U.S.C. §1983 and sought appropriate injunctive relief. Chief Judge Alexander V. Lawrence denied their preliminary injunction and dismissed the case. In his opinion and order, Judge Lawrence commented on both the litigation before his court and the Charlotte litigation and said:

"It strikes me that §1983 cases such as this and the Charlotte litigation present more of the trappings of federal jurisdiction than substance. The First Amendment right of public employees to organize is now fairly well established. But the check off of dues or deductions from pay checks, in the absence of statute or contract, is a mere privilege. It is a concession that may be bestowed or withdrawn at will by the governmental entity concerned. In effect, what plaintiffs contend is that the check off privilege is metamorphized into a constitutional right when it is arbitrarily withheld or unequally dispensed by the municipality. The Equal Protection clause does not confer new or substantive rights upon citizens. 'It is not the province

of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.' *San Antonio Independent School District v. Rodriquez,* 411 U. S. 1, 33."

"Members of a labor organization who are employed by a municipality possess no constitutional right to have union dues deducted from payroll checks and there is no corresponding obligation by the employer to grant or to continue the check off privilege. The fact that it is accorded to other organizations and entities for varying purposes does not render its withdrawal discriminatory . . ."

Another well-reasoned opinion on the issue of dues check off for public employees is that of Judge Geselle in *American Federation of Governmental Employees v. Hampton,* (D.D. C.) 77 L.R.R.M. 2977 (July 22, 1971), in which he stated:

"Arguments to the Court that something is against the interests of humanity, that in some way it is morally wrong, that it shouldn't happen in good union relations and questions of that sort are not for the courts. Congress could clearly make dues check off mandatory by a stroke of the pen if it wanted to do so. It hasn't done so. The statute is purely permissive. Congress has not affirmatively directed dues check offs."

". . . [I]t is not the function of the Court to interfere unless there appears to be . . . evidence of substantial interference with basic rights by arbitrary and capricious action or action that precludes clear constitutional guarantees."

". . . It appears to the Court that the remedies that the Plaintiffs are seeking are not in the courts but they must be addressed to the Executive and to the Legislature."

"The right of unionization in Government service is not a constitutionally-protected right, as the Court sees it. It is a right that is granted by grace and it is within the

province of the Legislature and the President to determine the limits of that right and how it should be exercised. . . ."

In *Bauch v. City of New York,* 21 N.Y. 2d 599, 289 N.Y.S. 2d 951, 67 L.R.R.M. 2994 (1968), *certiorari denied,* 393 U.S. 834, 69 L.R.R.M. 2435, the Court of Appeals for the State of New York spoke of depriving a union or its members of their right of freedom of association guaranteed by the First and Fourteenth Amendments of the U. S. Constitution. It found the Petitioners' claim lacked substance and

> "[T]hat nothing in the City's labor policy denies members of the petitioners union the right to meet, to speak, to publish, to proslytize, and to collect dues by the means employed by the thousands of organizations of all kinds, that do not have the benefit of a dues check-off."

The City respectfully contends that Charlotte is in exactly the same situation with respect to the Union Officers. There is no allegation that the City has ever denied the Union Officers or other members of the Union, the right to belong to a union, meet together, conduct union business, or join in any other activity of the union. There is only the allegation that the refusal to grant union dues check off has hindered or prevented them from joining together in associational activities for the betterment of the community, to hire legal counsel and to negotiate for a group insurance program (App. 25, 51, 52).

The City does not believe it has the responsibility of assisting the union members in the financing of the union's activities, the hiring of legal counsel, or the payment of officers salaries, and a group life and medical insurance program is available to them as City employees.

Chief Judge Arraj of the U. S. District Court of Colorado in *Local 858, American Federation of Teachers v. School District No. 1,* 74 L.R.R.M 2385, (1970) agreed with the decision in *Bauch, supra* saying:

> "[T]hat neither the First Amendment nor any other constitutional provision entitles a public employees' union which has lost a representative election to the special aid of a public employer's collection and disbursing facility."

If it is not a violation of a constitutional provision to deny union dues check off where there is a labor contract, then there can be no constitutional violation absent a contract as in the case before this Court.

The City respectfully contends that the case before this Court should not have been decided on the basis of equal protection as guaranteed by the Constitution. Justice Stewart in *Shapiro v. Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), articulates the limits of the fundamental rights rationale employed by the Supreme Court:

> "The Court today does not 'pick' out particular human activities, characterize them as 'fundamental' and give them protection . . . To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives that right no less protection than the constitution itself demands." Id. at page 620.

B. Dues Check Off is a Part of the Collective Bargaining Process.

Historically, dues check off has been considered an item of negotiation and a part of a collective bargaining agreement. Absent a statute, ordinance, or labor contract requiring check off, it is not a matter of right protected under 42 U.S.C.A., §1983.

The U. S. Court of Appeals for the First Circuit in *National Relations Board v. Reed & Prince Mfg. Co.,* 205 F. 2d 131,

certiorari denied, 346 U.S. 887, 74 S. Ct. 139, 98 L. Ed. 391 (1953) stated:

> "On the check-off proposal, the company registered its opposition, mainly on the ground that this was not a proper subject of collective bargaining. In this the company was mistaken."

However, in the case before this Court, the U. S. Court of Appeals for the Fourth Circuit chose not to rely upon the City's authorities in its brief because the Court said in the cases cited, the request for withholding arose and was denied in the context of collective bargaining (A-5, Petition for Writ of Certiorari). The City strongly contends that as a public employer, it has the right to withhold the granting of dues check off even though the question is not raised in the context of collective bargaining. If the City were involved in a collective bargaining agreement with Local 660, the decision on this question would have undoubtedly been to the contrary.

To the City's knowledge, the instant case is the only decision of a Federal Court of Appeals on the question of union dues check off in which the Equal Protection Clause of the Fourteenth Amendment has been applied.

However, in January of 1975, a similar suit was brought by a labor union in Alabama. In *American Federation of State, County, and Municipal Employees Union, AFL-CIO, Local No. 2557, et al., v. Melvin Bailey, Sheriff of Jefferson County, Alabama, et al.,* Civil Action No. 75-M-0021 in D.C.N.D., Southern Division, Decided, March 17, 1975, an unreported decision, Local 2557 alleged, among other things, that the sheriff had refused to grant the union members dues check off, while allowing deductions for other things. The union also alleged that the reason for the refusal of dues check off was to hinder its members in the exercise of their rights to form and belong to a union.

Chief Judge Frank H. McFadden dismissed the union's claim for dues check off saying that the allegation of a deprivation of rights under the Equal Protection Clause of the Fourteenth Amendment was not sufficient to state a claim. Judge McFadden declined to follow the decision in the Local 660 case, and his opinion very adequately expresses the City of Charlotte's concept of the question of union dues check off:

> "Union dues check-off is a familiar part of the collective bargaining process in the private sector. It is, at the very least, a permitted subject for collective bargaining under the NLRA. Check-off is a frequent component of union contracts. It is apparent that check-off is so closely intertwined with collective bargaining that it is impossible to speak of it outside the context. This close identification of dues check-off with collective bargaining raises an unsurmountable [*sic*] barrier for the plaintiffs. Since plaintiffs may not force defendants to the bargaining table for general negotiations, the plaintiffs may not force defendants to bargain about one item that is inextricably part of the general collective bargaining process. The Court is not in a position to grant plaintiffs part of the fruits of collective bargaining when they are not entitled to any of those fruits. In the private sector, the employer need not grant a union demand for dues check-off. 29 U.S.C.A. §159(d)."
>
> "... [P]laintiffs are left in the position where they do not have the same rights as private employees, and yet are demanding, as a matter of right, an item private employees can only hope to acquire through negotiation. The Court will not create a situation where public employees have at once more, and less, rights than private employees, under the present state of the law." (Full opinion appended to this brief).

In Alabama, as in North Carolina, municipalities have no duty or authority to enter into collective bargaining agreements under state law.

Although the National Labor Relations Act is inapplicable to states and their subdivisions, Sec. 302(c)[1] of that Act clearly demonstrates that Congress was not indifferent to the subject of check off of membership dues. The term "permits" in Sec. 302(c) denotes Congress had no intention of making dues check off mandatory.

Certiorari was denied on the question of Federal legislation and state legislation in regard to the check off. In *State of Utah v. Montgomery Ward,* 120 Utah 294, 233 P. 2d 685, (1951), *certiorari denied,* 342 U. S. 689, 72 S. Ct. 111, 96 L. Ed 654, the Utah Supreme Court held that a Utah state statute requiring employers to honor all check off irrespective of whether a collective bargaining agreement existed was preempted by Sec. 302(c)(4) of the NLRA. In the opinion, the Court stated:

> "Congress has effectively preempted the entire field of legislation in regard to the check-off. There is no room for the States to narrow or enlarge upon the exceptions without conflicting with the policy of Congress." 233 P. 2d at 688, 689.

More recently the District Court for the Northern District of Georgia relied on this decision in *SeaPAK v. Industrial Technical & Professional Employees Division of National Maritime Union,* 300 F. Supp. 1197 (1969), *re-hearing den.,* (5th Cir., 1970), 423 F. 2d 1229. Chief Judge Lawrence held

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[1]"Sec. 302(c) permits an employer to check off membership dues from the wages of those employees who have delivered to him an assignment executed in accordance with the provisions of that section." One of the stipulations attached was that the wage assignment not extend beyond the termination of the applicable collective agreement.

that the Georgia "Right to Work" Statute, which provides that union dues may be deducted by employers only on the individual order or request of an employer, revocable at will, was invalid. The Court's reasoning was that the provision was an effort to legislate in a sphere preempted by Congress with respect to the check off of union dues.

If the Union Officers are to have the right to dues check off, it must come from federal legislation, and the courts should not seek to legislate in this area.

The City respectfully asks this Court to look beyond the form of the pleadings which seek to equate dues check off to payment of insurance premiums and other fringe benefits, and to consider dues check off as a part of the collective bargaining process.

C. The Decision in this Case has Prompted Similar Lawsuits in other Cities, and Will Have a Far-Reaching Effect on Employer-Employee Relations.

Consideration of the question involved in this case is of practical importance because the decision of the lower courts has already had a substantial effect on municipal employer-employee relations.

In addition to *Strojny v. Rousakis, supra* and *Local 2557 v. Bailey, supra,* previously discussed, the City has knowledge of at least three other lawsuits which have been filed in other cities with essentially the same allegations and set of facts:

Jackson Firefighters Assoc., Local 87, et al., v. City of Jackson, Mississippi, et al., Civil Action No. J75-190(R) (D.C. S.D., Miss.), Jackson Division, September, 1975.

Fraternal Order of Police, Wallace Earle Nesbitt Lodge No. 25, et al., v. City of Newport News, et al., (D.C.E.D., Va.), Newport News Div., Civil Action No. 75-93-NN, filed October, 1975.

Local 995, International Association of Firefighters, et al., v. City of Richmond, et al., Civil Action No. 75-0341(R), (D.C. E.D., Va.), filed July 29, 1975.

In each of these complaints, unions have claimed that equal protection of the law has been violated because dues check off has been denied while other types of withholdings have been allowed. As a result of the decision in the case presently before this Court, the unions, by an extension of equal protection rights, have seized upon a means of *forcing* municipalities to grant dues check off without having to go through the *rigors* of employer-employee negotiations.

The City respectfully urges this Court that the lower courts' decision has improperly created a substantive constitutional right in applying the Equal Protection Clause of the Fourteenth Amendment to the subject of union dues check off.

In delivering the opinion in *San Antonio School District v. Rodriquez*, 411 U. S. 1, 36 L.Ed. 2d 16, 93 S. Ct. 1278 (1973), Justice Powell stated:

> "It is not in the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." at p. 43.

It is particularly unfortunate that such a substantive right be accorded to the unions by the courts rather than legislative bodies. If such a right is to be accorded, the City respectfully suggests to this Court to allow appropriate legislative bodies to grant this privilege, while establishing some administrative body to arbitrate the inevitable disputes which must occur.

In *Atkins, et al. v. City of Charlotte, et al.*, 296 F. Supp. 1068, (1969) (W.D.N.C.), a three-judge court was convened to determine the validity of North Carolina General Statute 95-98 which prohibits a municipality in North Carolina entering into a collective bargaining agreement with a union or

trade association. The Court upheld the validity of the statute, and in delivering the opinion for the Court, Circuit Judge Craven stated:

> "The solution, if there be one, from the viewpoint of the firemen, is that labor unions may someday persuade state government of the asserted value of collective bargaining agreements, but this is a political matter and does not yield to judicial solution. The right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution. The State is within the powers reserved to it to refuse to enter into such agreements and so to declare by statute." at 1077.

The City suggests to the Court that if this decision is allowed to stand, the court system will be cluttered by numerous cases in which litigants seek to prove that various classifications of withholdings which deny dues check off are a denial of equal protection of the law.

D. The Effect of Future Legislation on the Decision in this Case.

As discussed in the Petition for Certiorari, the City has a substantial interest in retaining a discretionary posture relative to union dues check off in the event federal legislation is enacted with regard to collective bargaining for local government employees.

It is entirely conceivable that within the next two years, Congress will enact legislation which would place municipal employees under the jurisdiction of the National Labor Relations Board, or some other administrative agency, thereby requiring collective bargaining. There are presently pending in the U. S. House of Representatives two such bills, *HR 77* and *HR 1488*. If such legislation is enacted, and there is a good possibility that it will be, then the City, by this decision,

will be locked in with a judicially ordered requirement for dues check off.

Many years of experience with labor strife in the public sector has indicated the desirability of having a body such as the NLRB available to arbitrate and settle disputes between the parties. With the rapid increase in unionization of public employees, it is likely that Congress will take some action that will create a collective bargaining framework for municipal government and its employees.

The City respectfully urges this Court not to step into an area where Congress appears likely to act. The judiciary should refrain from imposing remedies that are properly within the province of legislative bodies.

II. The City of Charlotte has Established a Rational Basis for Denying Dues Check Off to City-employed Firemen who are Members of a Labor Union.

A. The Constitutional Standards for Classification.

If a classification in legislation meets the prerequisites indispensable to the establishment of a class that it be reasonable and not arbitrary, and is based upon substantial distinctions with a proper relation to the objects classified and the purposes sought to be achieved, as long as the law treats all members of the class alike, it is not a violation of the federal guaranty of the equal protection of the laws. *16 AmJur 2d,* §502.

The general rule is well settled by unanimity of the authorities that a classification to be valid must rest upon material differences between the persons, activities, or things included in it and those excluded. *16 AmJur 2d, §500. Old Dearborn Co. v. Seagram Distillers Corp.,* 299 U. S. 183; *State Tax Comrs. v. Jackson,* 283 U. S. 527.

The Equal Protection Clause imposes a requirement of some rationality in the nature of the class singled out. However, the Constitution does not require things which are different in fact, to be treated in law as though they were the same. In defining a class subject to legislation, the distinctions that are drawn must have some relevance to the purpose for which the classification is made. *Rinaldi v. Yeager,* 384 U. S. 305, 308, 86 S. Ct. 1497, 1499, 16 L.Ed. 2d 577 (1966).

The City respectfully submits that the lower courts' decision in applying the Fourteenth Amendment to the issues involved was completely in error. The obvious difference between dues check off for the benefit of a union and ordinary payroll deductions for employee fringe benefits, should in itself establish the rational basis for classifying dues check off in a separate category.

The District Court in this case concluded that once the City offered the benefits of withholding to certain organization and entities, the City, under the Fourteenth Amendment, must administer such a withholding program in a fair and equitable manner, citing *Griffin v. School Board of Prince Edward County,* 377 U. S. 218 (1964), (A-12, Petition for Certiorari). The *Griffin* case dealt with desegregation—the closing of the public schools in Prince Edward County, Virginia to avoid the desegregation ordered by the U. S. Supreme Court. The acts complained of in *Griffin* were calculated to accomplish a totally impermissible objective.

There can be no impermissible objective in the City's refusing dues check off when no legislation requires it and, as discussed earlier, dues check off is a privilege which can be granted or taken away. In the lower courts' decision, there was no finding that the Union Officers had been denied union dues check off because of an impermissible objective. It is difficult to believe that this decision could have been made on the authority of *Griffin* because the Union Officers had no

right to dues check off for the benefit of the union, whereas, the children of Prince Edward County had every right under the Constitution to a public education. There is no analogy in the holding in *Griffin* to the denial of dues check off for the benefit of a union.

In *McGowan v. Maryland*, 366 U. S. 420 (1961), 6 L.Ed. 2d 393, 81 S. Ct. 1101, employees of a discount store were under indictment for selling articles in violation of Maryland's Blue Law. Maryland exempted bathing beaches, bath houses, dancing saloons and amusement parks and the retail sales of merchandise customarily sold there from the operation of the Blue Law, while prohibiting these articles to be sold at other retail establishments. In considering the case, Chief Justice Warren said "[t]he standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objectives. State legislatures are assumed to have acted within their power despite the fact that in practice their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it. *Kotch v. Board of River Port Pilot Comrs.*, 330 U. S. 552, 91 L.Ed. 1093." (Other citations omitted) 81 S. Ct. at 1105.

In the *McGowan* case, the Court found that a legislature "could reasonably find that these commodities necessary for the health and recreation of its citizens, should only be sold on Sunday by those vendors at the locations where the commodities are most likely to be immediately put to use". "Such a determination would seem to serve the consuming public

and at the same time secure Sunday rest for those employees, like appellants, of all other retail establishments." 81 S. Ct. at 1106. "The fact that these exemptions exist and deny some vendors and operators the day of rest and recreation contemplated by the legislature does not render the statute violative of equal protection since there appears to be valid reasons for the exemptions." 81 S. Ct. at 1105, 1106.

In a separate, but concurring opinion, in *McGowan*, Justices Frankfurter and Harlan were of the view the "claimant who challenges a discriminatory statute bears the burden of affirmative demonstration that in the actual statement of facts which surround its operation, its classifications lack rationality." 81 S. Ct. 1153 at 1194.

The City does not believe that the Union Officers, in instant case, have demonstrated a lack of rationality.

B. The City has Established a Policy with Respect to Voluntary Payroll Deductions which Satisfies the Constitutional Requirements.

The decision of the lower courts stated that the City had not established clear and fair standards, but that it had a *practice* of allowing deductions from employees' pay where the option was available to all employees, or all employees within a single unit, such as the Fire Department (A-10, Petition for Certiorari). (Emphasis added).

The City respectfully submits that whether one calls the City's policy a practice, a pattern, a standard, a program, or a guideline, and whether it is written or unwritten makes no difference. What is necessary, however, is that the legislative body of the City must determine which deductions shall be classified as permitted, and which shall be excluded, and establish a rational basis for this classification. The City believes that it has established a rational basis for refusing to grant dues check off. The standards are fair and clear.

Dues check off has been consistently denied to all labor organizations because they are special interest groups. Affidavits of the City Manager (App. 53-55) and the Personnel Director (App. 43-45) set forth the City's policy. The fairness of the policy is shown by the Personnel Director's statement that each request for a payroll deduction is considered to determine whether or not all employees of the City would be benefited by the deduction, and whether or not such a benefit would outweigh the administrative burden which would be imposed on the City (App. 44). It would appear that the procedure for making the determination is clear.

The City offered into evidence a list of permitted deductions (App. 16, 17, 32-34). The following deductions are required by law:

(a) Federal income tax
(b) State income tax
(c) North Carolina Firemen's Retirement System (App. 33, Ex. 1, p. 35)
(d) N. C. Local Government Employees Retirement System (App. 33, Ex. 2, p. 36)
(e) City, County, State tax levy (App. 33, Ex. 3, p. 37)

The only other permitted payroll deductions are:

(f) Medical and life insurance—The City has a contract with Life of Virginia, in which it participates, to provide a group insurance program for all of its employees.
(g) Firemen's Benefit Fund — Lincoln National Life — A group life insurance plan available to all firemen.
(h) Firemen's Credit Union—A savings and loan program available to all firemen.
(i) Ætna Deferred Compensation Plan—Available to all employees

(j) Firemen's Voluntary Pledge Fund—Not a regular deduction but is withheld from the wages of firemen, on request, only upon the death of an employed fireman for the benefit of his survivors. (p. 9, Petition of Certiorari)
(k) United Way—Available to all employees—a community charity organization enables an employee to make a charitable contribution for the year in small weekly payments.

The law is well settled to the effect that the courts are without the power to compel legislative bodies by injunction or otherwise, to enact specific pieces of legislation, or follow particular courses of action. The authority of making specific payroll deductions is a matter peculiarly within the discretion of the City Council of the City of Charlotte.

There are a number of cases involving judicial interference with the legislative function, and the courts have continually held that the judiciary may not supply what the legislature has studiously omitted.

> "It is the business of the courts to execute the law as they find it and not to make or modify it by interpolating qualifications which do not appear in the law itself." *International Bank v. Sherman,* 101 U. S. 403.

> "The United States Supreme Court lacks both authority and competence to assume the legislative role." *San Antonio Independent School District v. Rodriquez,* 411 U. S. 1, 93 S. Ct. 1278.

While the policy of the City Council of the City of Charlotte to permit optional payroll deductions only when they benefit all employees, or employees of a single unit, may serve to impose an alleged hardship on particular groups of employees, the Court should not interfere.

C. The City's Objective in Denying Dues Check Off Does Not Violate the Fourteenth Amendment.

Dues check off and several other requests (App. 43-45) received by the City have been found to lack conformity with the guidelines of the City's policy (App. 55). Dues check off is so inherently different from the other payroll deductions offered to City employees, that the reason for classifying it differently is self-evident. There is a material difference between the things included in the class of permitted deductions and the items in the class which are not permitted, (i.e., deductions which benefit special interest groups).

It has been held by the Court of Appeals in Arizona that a school board may, without violating equal protection, grant teachers the right to payroll deductions for whatever purposes desired while withholding the same privilege from non-teacher employees. *Edwards, et al. v. Alhambra Elementary School District No. 63*, 488 P. 2d 498, 15 Ariz. 293 (1971). Dues check off was one of the privileges granted. The Court denied rehearing and review.

A practical reason for establishing a system of classification of payroll deductions is the expense and administrative burden which an unrestricted payroll deduction plan would impose on the City (App. 45, 55). While employees' pay accounts are computerized, if the City were required to offer an unrestricted program to its employees, there undoubtedly would be many additional requests and the expense would increase. The fact that the District Court found that dues check off would be no more difficult than processing deductions for any existing programs (A-11, Petition for Certiorari), is a controverted question and no evidence on this point was placed before the Court.

Assignment of wages was the subject of a suit before the South Carolina Supreme Court in *Pacific Mills v. Textile Workers Union of America, Local 254*, 197 S. C. 330, 15 S.E.

134(1941). The employer, Pacific Mills, refused to enter into a contract with the union which contained a provision for union dues check off. A number of union members presented a partial assignment of their wages for the benefit of the union. The question before the court was whether the employer should be required to honor these assignments. Justice Baker pointed out that "[i]f appellant [Pacific Mills] be compelled to recognize these partial assignments, either in law or equity, then all or other partial assignments which may be executed and delivered by appellants' employees would likewise have to be honored and carried to a logical conclusion, and appellant would have to do a banking business insofar as open checking accounts are concerned."

An unrestricted withholding policy would also increase the possibility of liability on the part of an employer who withholds pay, particularly in a situation, between a union member and his union.

The City respectfully submits that its objective in denying check off is not impermissible, but rational, and does not violate the Fourteenth Amendment.

III. North Carolina General Statute §95-98 Prohibits Dues Check Off in that Check Off is an Agreement in which the Union is a Third Party Beneficiary.

North Carolina General Statute 95-98 (printed in full at page 5 of this brief), prohibits contracts or agreements between units of government and labor unions as bargaining agent for any public employee. The constitutionality of the statute was upheld in *Atkins, et al. v. City of Charlotte, et al.*, 296 F. Supp. 1068 (W.D.N.C. 1969).

On the basis of this decision, in July of 1969 the Office of the Attorney General of North Carolina issued an opinion which stated that:

"Since the check-off agreement deals with a segment or functioning of collective bargaining with the labor union, it is expressly prohibited by G. S. 95-98 . . . and the City of Charlotte has no authority of law and is expressly prohibited from operating or making any deductions or check-off from its employees' wages for the purposes of paying union dues . . ."

"The city employees wanted a labor union or labor organization and the three-judge federal court said they could have it but the union will have to see to its own financing without the aid of the city for the city is prohibited by law from entering into any such agreement or exercising such assumed authority even in the absence of an agreement." Vol. 40, *N.C.A.G.*, 591 (App. 38-41, Ex. 4).

The City respectfully contends that before check off could be accomplished, it would be necessary for the City to enter into an agreement with each employee that a portion of the employees wages would be paid over to the union for its benefit, in effect making the union a third party beneficiary under the agreement.

If the Courts require the City to grant dues check off, they would, in effect, be requiring the City to bargain collectively with the union through its members, which would either violate at a minimum or circumvent N.C.G.S. 95-98.

IV. The Findings of Fact Affirmed by the Fourth Circuit Court of Appeals were not Supported by the Evidence.

Based upon the pleadings, affidavits, discovery and arguments of counsel, the District Court made certain findings of fact. It is questionable whether or not a trial court should make findings of fact when granting summary judgment. Such a practice has been a subject of discussion many times by the federal courts.

Rule 52 of the Federal Rules of Civil Procedure exempts the resolution of summary judgment motions from the requirement of making fact findings. This is so because such a motion is not a proper procedure for resolving factual disputes. Judge Craven, (now Circuit Judge), properly analyzed the role of facts in summary judgment motions in two decisions rendered while sitting as a District Court Judge. As he noted, a trial court is not empowered to make findings of fact, but only to determine that no factual dispute exists. Of course, in order to decide that the facts are not controverted, a trial judge must ascertain what the facts actually are. *Wehrle v. Brooks*, 269 F. Supp. 785, 788 (W.D.N.C., 1966). But once this point is reached, facts are recited, if at all, only to demonstrate the appropriateness of the case for summary judgment. *Manning v. State Farm Automobile Insurance Company*, 243 F. Supp. 619, 620 (W.D.N.C. 1965). While some appellate courts have criticized including findings of fact in a summary judgment order as implying the existence of factual differences, the better rule would appear to be that the inclusion of the factual basis for the decision assists an appellate court in the review process. *Compare General Teamsters, Chauffeurs & Helpers Union v. Blue Cab Company*, 353 F. 2d 687, 689, (7th Cir., 1965) *with Fromberg, Inc. v. Gross Manufacturing Company*, 328 F. 2d 803, 806 (9th Cir., 1964). The corollary to this principle must be that a trial court may not go beyond the record or matters susceptible to judicial notice to assert a factual basis for its legal conclusion. In a trial situation, such "findings of fact" would be subject to being dismissed as "clearly erroneous" under Rule 52. In a summary judgment setting, it can only mean that the movant in whose favor the "facts" are "found" has failed to establish his entitlement to summary judgment.

It appears from the above, that the Union Officers are not entitled to a summary judgment. Their entitlement to such

a judgment is lacking because certain of the facts were in dispute. The City made a motion for summary judgment in the belief that it was appropriate for the City, and still believes this to be the case. However, the City is not asking this Court to remand this case for a trial on the merits, because the questions involved are basically questions of law. It is respectfully urged that this Court reverse the lower courts and grant summary judgment for the City.

The District Court misstated certain facts and has drawn certain conclusions which are in dispute.

In Finding of Fact No. 7, the trial court found that "[d]efendants have not denied any requests for payroll deductions from any persons or organizations in the Fire Department within the past ten years except the plaintiffs' [Union Officers] requests." (A-10, Petition for Certiorari). The City respectfully contends that this finding is inaccurate, not supported by the evidence and misleading because it restricts consideration of the City's policy with respect to deductions to Fire Department personnel. To be accurate, the finding of fact with respect to this item should have found that twelve requests for withholding have been denied to City employees since 1968 including those requests from the Union Officers (App. 43, 44). The Fire Department employees should not have been considered in a separate category so that this finding was restricted to them.

In the Personnel Director's Affidavit, he stated under oath that the North Carolina Firemen's Association requested assessment of $3.00 yearly dues check off and was denied (App. 44). This, in itself, shows that Finding of Fact No. 7 is not supported by the evidence and is controverted.

In Finding of Fact No. 10, the trial court found that withholding union dues from the wages of the firemen would be no more difficult than processing the deduction for any of the City's existing programs. (A-11, Petition for Certiorari).

Surely, the trial court cannot believe that if dues check off was granted under Fourteenth Amendment rights, the City could then deny any other organization or individual employee the right to deductions upon request. An unrestricted and wide open right to withholding would be a substantial burden on the City and that is a disputed fact. (App. 45, 55).

For the above reasons, the City respectfully urges the Court that summary judgment should not have been issued in favor of the Union Officers, and this decision should be reversed.

CONCLUSION

Based upon all of the foregoing, it is respectfully submitted that the decision of the lower courts must be reversed and Summary Judgment issued in favor of the City of Charlotte.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES UNION, AFL-CIO, LOCAL NO. 2557; et al.,
Plaintiffs

- v -

MELVIN BAILEY, Sheriff of Jefferson County, Alabama; et al.,
Defendants

CIVIL ACTION NO. 75-M-0021

Filed in Clerk's Office
No. Dist. of Alabama
Mar. 17, 1975

ORDER

This cause came on to be heard on defendants' motions to dismiss the complaint. The Court has examined the pleadings, considered the briefs ubmitted by the parties and has heard the oral argument of counsel. The Court is of the opinion that the motions are due to be granted in part and overruled in part.

I

Paragraph 5 of the complaint is due to be dismissed. Plaintiffs allege a deprivation of rights under the Equal Protection Clause of the fourteenth amendment in that defendants refuse to allow a voluntary deduction from employee pay checks for union dues. This contention is not sufficient to state a claim, under present law.

Union dues check-off is a familiar part of the collective bargaining process in the private sector. It is, at the very least, a permitted subject for collective bargaining under the NLRA. Check-off is a frequent component of union contracts. It is apparent that check-off is so closely intertwined with collective bargaining that it is impossible to speak of it outside that context.

This close identification of dues check-off with collective bargaining raises an unsurmountable barrier for the plaintiffs. The sheriff and the County Commission have no duty to bargain with any representatives of the employees under Alabama or federal law. *AFSCME, Local 2557, et al. v. Bailey, et al.*, C.A. No. 73-P-199-S (N.D. Ala., June 13, 1973, Dec. 19, 1973) (hereinafter *Bailey I);* 29 U.S.C.A. §152(2). Since plaintiffs may not force defendants to the bargaining table for general negotiations, the plaintiffs may not force defendants to bargain about one item that is inextricably part of the general collective bargaining process. The Court is not in a position to grant plaintiffs part of the fruits of collective bargaining when they are not entitled to any of those fruits.

Moreover, the plaintiffs are seeking an order of the Court to force defendants to allow union dues check-off. In the private sector, the employer need not grant a union demand for dues check-off. 29 U.S.C.A. §158(d). If such a provision is included in the final contract, it is the product of the give and take of the bargaining process, perhaps with the union conceding a point in order to obtain the benefits of the check-off. In the case at bar, plaintiffs, who do not have any collective bargaining "rights," wish the Court to give them a benefit they would not necessarily obtain if they could force defendants to bargain. Thus, the plaintiffs are left in the position where they do not have the same rights as private employees, and yet are demanding, as a matter of right, an

item private employees can only hope to acquire through negotiation. The Court will not create a situation where public employees have at once more, and less, rights than private employees, under the present state of the law in this area.[1]

Under the foregoing analysis, the plaintiffs are unable to state any set of facts under which they would be entitled to the relief they request. They are foreclosed by law. The Court declines to follow *Local 660, International Association of Fire Fighters v. City of Charlotte,* No. C-C-73-236 (N.D. N.C., September 4, 1974).

II

Paragraph 6, 7 and 8 do state a claim on which relief can be granted, even though paragraph 6 suffers a lack of clarity and precision. Defendants argue that *Bailey I* forecloses this Court from acting on at least some of the issues raised by these paragraphs, or that plaintiffs are due to be remitted to their right to seek a contempt citation for disobedience of the judgment entered in *Bailey I* before the judge who decided that case. This problem is more apparent than real, as the Court does not foresee any problem in conforming its action to the principles laid out in *Bailey I*, and will not be slow to remedy any contravention of the order entered by Judge Pointer. The fact that this Court is composed of a number of judges does not affect its essential unity.

Defendants also raise the question of whether plaintiffs should be required to state these claims as compulsory counterclaims in *Bailey v. AFSCME, Local 2557, et al.*, C.A. No.

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[1]Defendants also contend that paragraph 5 is barred as res judicata from *Bailey I*. While the Court need not reach this point, given its disposition of paragraph 5, it would note that *Bailey I* was concerned with the first amendment rights of deputy sheriffs, and not their fourteenth amendment rights. The findings made in *Bailey I* expressly do not foreclose the issue of dues check-off. Under these circumstances, defendants' position does not seem well-taken.

188-000, Circuit Court for the Tenth Judicial Circuit of Alabama, under Rule 13(a), Ala. R. Civ. Pro. The Court sees this as a question of comity, and deems it inappropriate to deprive plaintiffs of their federal forum at this point in time.[2] The Court will take the proper action to avoid any undue interference with the state court action, should the need for such action arise in the future.

III

Accordingly, it is ORDERED, ADJUDGED and DECREED that defendants' motions to dismiss be, and the same hereby are, granted as to paragraph 5 of the complaint. In all other respects the motions are overruled. Paragraph 5 of the complaint is hereby dismissed. Defendants shall answer the remaining claims within thirty days of the date of this order.

Done this 17th day of March, 1975.

s/ FRANK H. MCFADDEN
Chief Judge

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[2]The Court has been informed by counsel that the state court action, which dealt with injunctive relief against a "sick-out" by the deputies, is essentially over. The Court notes that the temporary restraining order entered in the case ran out, at the end of the last consent extension, on February 14, 1975.

Supreme Court, U. S.
FILED
JAN 2 1975
MICHAEL RODAK, JR., CLERK

75-250

Supreme Court of the United States

October Term, 1975

CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, THE CHARLOTTE CITY COUNCIL, THE GOVERNING LEGISLATIVE BODY OF THE CITY OF CHARLOTTE, AND FRED ALEXANDER, JAMES WHITTINGTON, MILTON SHORT, JOE WITHROW, PAT LOCKE, KENNETH R. HARRIS, AND NEIL C. WILLIAMS, AS MEMBERS OF THE CHARLOTTE CITY COUNCIL AND INDIVIDUALLY,
Petitioners,

v.

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AN UNINCORPORATED LABOR ORGANIZATION, AND R. L. MIDDLETON, W. M. BRAWLEY, D. F. BLACK, M. L. KNIGHT AND R. D. MCCALL, AS OFFICERS OF LOCAL 660 AND INDIVIDUALLY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Supreme Court of the United States

October Term, 1975

75-250

CITY OF CHARLOTTE, ET AL.,

Petitioners,

v.

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Order of the United States District Court for the Western District of North Carolina are reported at 381 F.Supp. 500. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 518 F.2d 83. Copies of these opinions are appended to the Petition for Writ of Certiorari filed August 16, 1975 at pp. A-3 to A-17. (The Petition will hereafter be referred to as "Pet. ....." with the appropriate page.)

JURISDICTION

The judgment of the Court of Appeals was entered June 17, 1975. The Petition was filed August 16, 1975. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the courts below properly held that the City of Charlotte had no rational basis for refusing to withhold from employees' wages monies which the employees requested be transmitted to a labor union, while honoring such requests in favor of other entities and organizations, thereby violating the Equal Protection Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Constitutional amendments and statutes are set forth in the Brief for Petitioners at pp. 3-6.

STATEMENT

This action was filed on October 2, 1973, in the United States District Court for the Western District of North Carolina, by the respondents herein (hereinafter referred to as "plaintiffs"), five Charlotte firemen and Local 660, International Association of Firefighters (hereinafter referred to as "Local 660"), against petitioners, the City of Charlotte, the Charlotte City Council and its members (hereinafter referred to as the "City" or the "defendants"). The plaintiffs alleged that the City had refused to honor requests of some 300 of Charlotte's 543 firemen to withhold from their paychecks and to pay to Local 660 their union dues. Plaintiffs asserted that the City's refusal to deduct their union dues on a voluntary basis while making similar deductions for a variety of other purposes violated rights guaranteed to them by the First and Fourteenth Amendments.

The case was submitted to the District Court upon cross

motions for summary judgment, upon affidavits, and upon defendants' answers to interrogatories. This record establishes the following:

Plaintiffs are members of Local 660. The Local had 351 members as of February, 1974, of the 543 uniformed Charlotte firemen. Plaintiffs and other members of the Local began their efforts to have union dues withheld from their paychecks in 1969. (Appendix at p. 22, 24.)[1] In 1970, plaintiffs and other members of the Local submitted more than 300 authorization cards signed by individual firemen to the Charlotte City Personnel Director requesting that their dues be withheld from their payroll checks and be paid to Local 660. (A. 22, 24.) Similar requests have been made at various times since 1970.

All requests made by plaintiffs and other members of the Fire Department to have union dues withheld from their paychecks have been consistently denied. (A. 18.) With the exception of the requests for withholding made by plaintiffs, no request for withholding made by employees of the Charlotte Fire Department has been denied. (A. 17.) From time to time, defendants have refused to allow withholding of dues requested by employees of other City departments to be paid to the American Federation of State, County, and Municipal Employees, the North Carolina Labor Alliance, and the Retail, Wholesale and Department Store Union.

The defendants have no written criteria by which they decide which requests for withholding to honor and which

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[1] (The Appendix will hereafter be cited as "A.——" with the appropriate page reference.)

requests to refuse. In practice, the defendants withhold moneys from City employees to be delivered directly to various organizations and entities for the following purposes:

1. Federal Income Tax
2. State Income Tax
3. North Carolina Firemen Retirement
4. North Carolina Local Government Retirement System
5. Medical Insurance (Life of Virginia)
6. Life Insurance (Life of Virginia)
7. United States Savings Bonds
8. United Way (Mecklenburg and Union Counties)
9. Firemen Benefit Fund (Lincoln National Life)
10. Charlotte Fire Department Credit Union
11. Aetna Deferred Compensation Program
12. Charlotte Fire Department Voluntary Pledge Fund
13. City-County Tax Levy
14. State Tax Levy.

In furtherance of Local 660's objectives, plaintiffs have, on numerous occasions, discussed with private insurance companies the possibility of obtaining life insurance for the membership of the Local. Plaintiffs were advised that group policies could be obtained only through a dues check-off system. (A. 25, 58-60.) In addition, the defendants' refusal to allow plaintiffs the requested withholding hinders plaintiffs' efforts to obtain legal counsel, to petition elected representatives, to engage in various community service activities, and to join together for other associational purposes. (A. 22-26, 51-52.)

The defendants' payroll deduction procedure is computerized and the District Court found "[w]ithholding

union dues from the wages of individual firemen would be no more difficult than processing the deductions for any of the presently existing programs for which payroll deductions are made." (Pet. A-11.)

On September 5, 1975, the District Court granted plaintiffs' motion for summary judgment. The Court found:

> "The defendants' practice has been to allow check offs from employees' pay to organizations or programs as required by law or where the check off option is available to all City employees or where the check off option is available to all employees within a single employee unit such as the Fire Department. Defendants have not allowed check off options serving only single employees or programs which are not available either to all City employees or to all employees engaged in a particular section of City employment." (Pet. A-10.)

Holding that defendants' actions had hindered plaintiffs' associational rights, that the City had suggested neither a compelling state interest nor any rational basis for their actions, that defendants would not be unduly burdened by plaintiffs' requests, and that the defendants' actions were arbitrary, were without rational basis and violated the plaintiffs' Fourteenth Amendment rights, the District Court granted plaintiffs' Motion for Summary Judgment and issued the following Order:

> "So long as the defendants continue, without clearly stated and fair standards, to withhold moneys from the paychecks of City employees for other purposes, organizations and entities not specifically required by law, the defendants, their agents, successors, employees and any persons acting in concert with the defendants or at their direction are enjoined from refusing to

withhold moneys from the paychecks of the individual plaintiffs to be paid to Local 660." (Pet. A-14.)

The defendants appealed to the United States Court of Appeals for the Fourth Circuit. In an opinion filed on June 17, 1975, the Court of Appeals (Judges Russell, Field and Thomsen) affirmed the District Court order emphasizing the limited nature of the injunction:

> "Defendants may hereafter adopt reasonable, objective standards for determining which requests for withholding will be granted and which denied. If, on the basis of a rational classification made under such standards, defendants determine that such withholding requests as are involved in this case should be denied, the defendants may move to reopen the case in the district court." (Pet. A-6.)

The defendants filed a petition for writ of certiorari in this Court on August 16, 1975; certiorari was granted on October 14, 1975.

ARGUMENT

The City's Refusal To Check Off Dues As Requested By The Plaintiffs Is An Arbitrary And Irrational Infringement Of Plaintiffs' Rights Under The Equal Protection Clause Of The Fourteenth Amendment.

The City's argument proceeds from the premise "dues check off is a privilege—not a constitutionally protected right" (Brief of Petitioners, p. 11). This proposition, which originated in a celebrated case involving public employees,[2] has now been thoroughly discredited, not least in cases involving public employees.[3]

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[2] *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 517-518 (Holmes, J.).

[3] See, e.g., *Wieman* v. *Updegraff*, 344 U.S. 183, 191-192 (1952);

While the nature of the right affected may determine the standard for evaluating allegedly discriminatory conduct (see e.g. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17-39 (1973); *United States* v. *Moreno*, 413 U.S. 528, 538 (1973), the Equal Protection Clause of the Fourteenth Amendment establishes that in all events differences in governmental treatment must at least "bear some rational relationship to legitimate state purposes." (*Rodriguez*, *supra*, 411 U.S. at 40. See also, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).) The reason for this Constitutional requirement was expressed by Mr. Justice Jackson with characteristic clarity:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Railway Express Agency v. *New York*, 336 U.S. 106, 112-113 (1949) (concurring opinion).

Garrity v. *New Jersey*, 385 U.S. 493, 499-500 (1967); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972); *Keyishian* v. *Board of Regents*, 345 F.2d 236, 239 (2d Cir., 1965) (Marshall, J.), aff'd. 385 U.S. 589 (1967); *Illinois State Employees Union, Council 34, Etc.* v. *Lewis*, 473 F.2d 561, 568 (7th Cir., 1972) (Stevens, J.), cert. denied 410 U.S. 928, 943.

We now show that defendants have been unable to demonstrate that their refusal to check off union dues while withholding monies to other entities and organizations "rationally furthers a legitimate state purpose or interest." *Rodriguez, supra,* 411 U.S. at 55; it is arbitrary conduct, which the courts below properly condemned as violative of the Fourteenth Amendment.

Early in the litigation, plaintiffs sought to determine the standards used by the City with respect to withholding. In response to Interrogatory 4 (A. 14), the defendants stated:

> "4. Because of a potentially large number of organizations that might desire withholding service, the City has generally limited such withholdings to tax, retirement-insurance, limited investment situations and certain charitable contributions. Unrestricted withholding is impractical due to the volume of clerical and administrative work that such a process would demand." (A. 17.)

The first sentence simply states what the City was doing, not why.[4] When defendants attempted to state a rational basis for distinguishing the plaintiffs' request from these deductions, it failed completely. See pp. 11-14 *infra.* The argument of practicability in the second sentence is without merit. The District Court concluded that "withholding dues from wages of the firemen would be no more difficult than

[4] The City asserts that the evidence shows that dues check off had been requested by the North Carolina Fireman's Association and was denied (Brief for Petitioners, p. 32 citing A. 44). In the incident thus referred to, the Fire Chief had originally directed that a check off be granted the Association. After this directive was called to the District Court's attention by plaintiffs, the Defendants filed an affidavit stating the Association's request for check off had been denied. (A. 24-29, 44)

processing the deduction for any of the City's existing programs." (Pet. A-11.) The Court was entirely correct.

Importantly, the City makes no claim now, and made no claim below, that the administrative costs to the City would be anything more than minimal. All that is involved is a brief amount of key punch time. Instead, the City asserts that "[t]here would be a substantial expense to the City if employees could require the City to deduct and withhold from employees' pay any and all of the innumerable purposes which might arise." (A. 55.)

Plaintiffs do not seek and the District Court did not order any unlimited withholdings. The City is free to develop fair and reasonable standards to meet any possible cost problem. A rule which would permit deductions for an organization which all employees of a City department can join or for organizations having a membership of a majority of a department's employees might be an appropriate standard to be applied to all checkoff requests. Alternatively, withholding costs could be equitably spread among all its beneficiaries. Plaintiffs would be willing to meet their fair share of these expenses.

Later in the case, the defendants asserted the following in support of their actions "it is the policy of the Charlotte City Council to permit and authorize those deductions which would directly benefit all City employees, but that it is contrary to the policies of the Charlotte City Council to permit deductions which would benefit only some special group of employees" (A. 54).

The District Court correctly found on the basis of actual practice that the defendants had followed no such policy. Indeed, the facts indicate that organizations and individ-

uals have benefited from withholding even where only City employees in one department were eligible to participate (as with the Firemen's Credit Union and the Charlotte Fire Department Voluntary Pledge Fund) and where only interested employees requested a certain withholding (e.g., United States Savings Bonds, United Way, Deferred Compensation, Medical Insurance and Life Insurance).

Because the facts conflicted with the claimed standards, the District Court rejected defendants' contention that plaintiffs' request for dues checkoff had been denied for failure to meet established criteria. The Court found, from what the defendants had actually allowed, that the City's practice had been

> "to allow check offs from employees' pay to organizations or programs required by law or where the check off option is available to all employees within a single employee unit such as the Fire Department. Defendants have not allowed check off options serving only single employees or programs which are not available either to all City employees or to all employees engaged in a particular section of City employment." (Pet. A-10 to A-11).[5]

In addition to the explanations introduced into the record as alleged withholding policies, the City now offers four arguments.

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[5] Petitioners have assailed some facts determinations of the lower courts (Brief of Petitioners at pp. 30-33). We do not treat those contentions separately both because they are plainly without merit and because it is our understanding that this Court does not grant certiorari "to review evidence and discuss specific facts" *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). Moreover, the City really does not contend summary judgment was improper in this case. Indeed, they renew their plea for such a ruling in their favor.

The first of these is a denial of the necessity to offer any rational basis:

> "[t]he obvious difference between dues check off for the benefit of a union and ordinary payroll deductions for employee fringe benefits, should in itself establish the rational basis for denying dues check off in a separate category."[6] (Brief for Petitioners at 23.)

Knowing this tactic must fail the City apparently maintains the requested check off can be denied (1) because it is part of collective bargaining, (2) because it is prohibited by N.C.G.S. § 95-98, and (3) because the City's position serves to weaken a labor union. Plaintiffs contend that none of the above factors meet the *Rodriguez* standard.

1. It is no justification for the present denial of a checkoff that that subject may ultimately be one for collective bargaining. Presently, collective bargaining by public employees in the State of North Carolina is merely in the womb of time. It will take, as the petitioners themselves emphasize, a revision of North Carolina law, or an Act of Congress, to bring about this result. If collective bargaining is ultimately permitted or mandated with respect to public employees in North Carolina, the statute which

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[6] This *ipse dixit* is advanced also by the *amicus curiae* Sheriff Bailey:

> "The opinion of the District Court and the opinion of the Fourth Circuit both fault the City of Charlotte for not having publicly stated legitimate reasons for distinguishing between checking off United Way contributions and checking off union dues. The reasons for distinguishing between these two are so obvious so as to require no statement, either from the City or from *amicus curiae*. They are the public policy of the City of Charlotte. They are the public policy of most municipalities and governmental units in the United States. They protect the people." (Brief for Amicus Curiae at 12)

so provides will, we may assume, afford the public employer the same privilege to, as a negotiating tactic, deny the checkoff now vouchsafed to private employers by § 8(d) of the National Labor Relations Act, see *Porter Co.* v. *NLRB,* 397 U.S. 99 (1970), and the dissenting opinion presaging *Porter* of then Judge (now Chief Justice) Burger in *United Steelworkers of America* v. *NLRB,* 390 F.2d 846 (D.C. Cir. 1967), *cert. denied,* 391 U.S. 904 (1968). Such a fundamental alteration of the respective rights and duties of the employer, the employees and the union, will present a rational basis for denying a checkoff, and its denial under those circumstances would therefore be entirely consonant with the trial court's limited injunction here.[7] Indeed, even if the District Court had not so carefully tailored its in-

[7] *Bauch* v. *City of New York,* 21 N.Y.2d 599, 289 N.Y.S.2d 951 (1968), *cert. denied* 393 U.S. 834, and *Local 858, American Federation of Teachers* v. *School District No. 1,* 314 F. Supp. 1069 (D. Colorado, 1970), cited by Petitioners (Brief for Petitioners, pp. 14-15) illustrate how the existence of a collective bargaining relationship rationally justifies withholding of the check off. In both cases the public employer checked off dues to the union which was the majority representative of the employees authorized to bargain on behalf of an entire unit, but denied the check off to a minority union which was not the statutory representative. As Judge Arraj explained in *Local 858*:

> "We are satisfied that the grant of exclusive privileges to the duly elected bargaining representative of public school teachers by the School District promotes a compelling government interest. The interests of the state above outlined in our discussion of the First Amendment claim are compelling, for labor peace and stability in an area as vital as public education are indisputably a necessity to the attainment of that goal. Inter-union strife within the schools must be minimized. Unnecessary work stoppages and the consequent impairment of the educational process cannot be tolerated without significant injury to public education." 314 F. Supp. at 1077.

junction to the present situation, such a legal change would relieve the defendants of the obligations thereunder, see *System Federation* v. *Wright,* 364 U.S. 642, 648-650 (1961) following *Pennsylvania* v. *Wheeling & B. Bridge Co.,* 18 How. 421., 15 LEd 435.

But as long as the pubic employer is exercising unilateral standardless governmental authority, it cannot escape the limitations of a higher authority—the United States Constitution—by reliance on a change of status which is at best only a possibility.

2. N.C. Gen. Stat. Section 95-98, in pertinent part, prohibits any "contract between . . . any city . . . and any labor union . . . as bargaining agent for any public employees. . . ." Contrary to the City's argument, the statute does not prohibit dues check-off as directed here. The District Court held that N.C.G.S. § 95-98 "does not apply to this case; no contracts or agreements are contemplated between defendants and Local 660" (Pet. A-13).

The Court of Appeals similarly held: "[A] state statute (N.C.G.S. § 95-98) prohibits contracts between governmental agencies or units (including cities) and labor unions as bargaining agents for public employees but that statute does not justify denying the request for withholding made by plaintiffs in this case" (Pet. A-6).

The contrary opinion of the Attorney General (A. 38-41) relied upon by defendants is devoid of any argument or reasoning consistent with its conclusion[8] and was properly

[8] The withholding agreement, if it is a contract at all, is one made by the individual employee with the City. Local 660 is, at most, a third-party beneficiary to any contract between the individual employee and the City. In such an arrangement, Local 660

rejected by the Courts below, whose views deserve the respect of this Court. "The issue presents solely a question of state law and '[this Court] ordinarily accept[s] the determination of local law by the Court of Appeals * * * and [it should] not disturb it here.' Ragan v. Merchants Transfer Co. 337 U.S. 530, 534 (1949); General Box Co. v. United States, 351 U.S. 159, 165 (1956); The Tungus v. Skovgaard, 358 U.S. 588, 596 (1959)." *C.I.R.* v. *Estate of Bosch,* 387 U.S. 456, 462 (1967).

3. As we have shown, the City has been unable to advance any rational basis for its classification whereby monies are deducted from employees' wages and sent to numerous entities and organizations but not allowed for labor unions. The City understandably does not argue that the fact that plaintiff is a labor union is itself a rational basis for the challenged classification. As the District Court stated,

> "Desire to discourage municipal labor organizations including Local 660 would of course be an impermissible reason for refusing to withhold moneys from the paychecks of the individual plaintiffs" (Pet. A-13).

The cases are unanimous in holding that the right of public employees to join a labor union (as distinguished from bargaining collectively through a union) is protected by the First Amendment.[9] And "if the constitutional conception

makes no promise, assumes no obligations, and undertakes to do nothing. Local 660 would not, under North Carolina law, be a party to any such contract. See, *Lammonds* v. *Aleo Manufacturing Co.*, 243 N.C. 749, 92 S.E. 2d 143 (1956) (employee is third party beneficiary in collective bargaining agreement); *Dixie Container Corp.* v. *Dale*, 273 N.C. 624, 160 S.E. 2d 708 (1968).

[9] *American Federation of State, County, and Municipal Employees* v. *Woodward*, 406 F.2d 137, 139 (8th Cir., 1969); *Mc-Laughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir., 1968); *Lontine* v. *Van Cleave*, 483 F.2d 966 (10th Cir., 1973); *Atkins* v. *City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C., 1969) (Three-Judge Court).

of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States* v. *Moreno, supra,* 413 U.S. at 534. See also, *Police Department* v. *Mosley,* 408 U.S. 92, 95 (1972).

Thus, since the City has not and cannot demonstrate a rational basis for its refusal to treat plaintiffs equally, the carefully tailored relief fashioned by the District Court clearly was appropriate.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully pray that the Order of the District Court filed on September 5, 1974, be affirmed.

Respectfully submitted,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-250

CITY OF CHARLOTTE, a Municipal Corporation, THE CHARLOTTE CITY COUNCIL, the Governing Legislative Body of the City of Charlotte, and FRED ALEXANDER, JAMES WHITTINGTON, MILTON SHORT, JOE WITHROW, PAT LOCKE, KENNETH R. HARRIS, and NEIL C. WILLIAMS, as Members of the Charlotte City Council and Individually,
Petitioners-Appellants,

v.

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, an Unincorporated Labor Organization, and R. L. MIDDLETON, W. M. BRAWLEY, D. F. BLACK, M. L. KNIGHT and R. D. McCALL, as Officers of Local 660 and Individually,
Respondents-Appellees.

BRIEF AND ARGUMENT

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BRIEF AND ARGUMENT

Of Mel Bailey, Sheriff of Jefferson County, Alabama, Amicus Curiae on Behalf of Petitioners-Appellants

INTEREST OF AMICUS CURIAE

Melvin Bailey, Sheriff of Jefferson County, Alabama, (hereinafter "Bailey") appears *amicus curiae* pursuant to the consent of all parties. U. S. Sup. Ct. Rule 42. 28 U.S.C.A. (A-1).

Bailey was the "lead" defendant in *American Federation of State, County & Municipal Employees Union, AFL-CIO, Local No. 2257, et al. v. Melvin Bailey, Sheriff of Jefferson County, et al.*, Civil Action No. 75M 0021, United States District Court for the Northern District of Alabama, Southern Division. Plaintiffs therein are a voluntary, unincorporated labor organization which purports to represent certain deputy sheriffs employed by the Jefferson County Sheriff's Department and individual members of said union who are employed by the Jefferson County Sheriff's Department. Plaintiffs, *inter alia*, sought that Bailey and the Commissioners of Jefferson County, Alabama, under 42 U.S.C. 1983, be compelled to check off union dues of employees of the Jefferson County Sheriff's Department, alleging that other deductions from the paychecks of employees of the Sheriff's Department were allowed (A-3). On March 17, 1975, the District Court, Hon. Frank H. McFadden, Chief Judge, dismissed the said portion of the complaint alleging a deprivation of plaintiffs' rights under the equal protection clause of the Fourteenth Amendment by virtue of defendants' refusal to allow check off for union dues. (A-7). Expressly declining to follow Judge McMillan's September 4, 1974, order entered in the instant cause, Judge McFadden ruled that dues check off is inextricably intertwined with the collective bargaining process, and inasmuch as the Sheriff of Jefferson County and the Jefferson County Commission have no duty to bargain collectively with any representatives of their employees under Alabama or Federal law, these plaintiffs could not force defendants to concede on one aspect of collective bargaining, i.e., dues check off.

The case was subsequently dismissed pursuant to Rule 41(b), Federal Rules of Civil Procedure, for failure of plaintiffs to further prosecute, but a motion to reinstate it in its entirety has been briefed and argued and is presently pending. Thus there are conflicting decisions on the issue, one by the United States Court of Appeals for the Fourth Circuit and one by the United

States District Court for the Northern District of Alabama (in the Fifth Circuit). *See*, U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

On August 26, 1975, Bailey filed Civil Action No. 193-537 in the Circuit Court for the Tenth Judicial Circuit of Alabama (In Equity), seeking a declaratory judgment that defendants therein, the members of the Jefferson County Commission, had no legal authority to check off union dues of the employees of the Jefferson County Sheriff's Department, or to order Bailey to do so. (A-11). On October 6, 1975, the Circuit Court, by Hon. William C. Barber, Judge, ordered that neither the County Commission of Jefferson County, Alabama, nor the Sheriff of Jefferson County could implement any check off of union dues of the employees of the Jefferson County Sheriff. (A-17). Defendants and intervenor (AFL-CIO) in that cause have taken an appeal to the Supreme Court of Alabama.

SUMMARY OF ARGUMENT

The issue of union dues check off is an essential concomitant of the collective bargaining process. The City of Charlotte has no duty to collectively bargain with its employees. Indeed, it is prohibited by law from doing so. Since there is no fundamental right to collective bargaining, and inasmuch as check off is inextricably intertwined with the collective bargaining process, the City's refusal to check off union dues is simply a justifiable refusal to do that which it is not obligated to do, i.e., bargain collectively with its employees. The refusal impinges not upon respondents' First Amendment rights to freedom of association, but only upon their nonexistent "right" to collective bargaining, the right they are really looking for.

Collective bargaining is a give and take process, and one of the possible fruits thereof is union dues check off. To hold that respondents are constitutionally entitled to union dues check

off is to give them the fruits of collective bargaining when they are not entitled to collective bargaining in the first place. The right of collective bargaining should be conferred upon respondents, if at all, only by Congress or by the Legislature of the State of North Carolina.

Having been unsuccessful in their prior attempts to obtain declarations that they have a constitutional right to collective bargaining, respondents are now seeking to elevate one of the *fruits* of collective bargaining to the status of a "fundamental right".

Lastly, the practical effect of such a constitutional innovation would be disastrous.

ARGUMENT

Both of the lower courts in the instant case failed squarely to address the City's main argument that a request for union dues check off is distinguishable from a deduction for medical or life insurance or United Way because dues check off is inextricably intertwined with collective bargaining, which is forbidden to the City. N.C. G.S. 95-98; *N.C. Attorney General Reports*, 1968-70, Volume 40, at page 591; *see, Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D. N.C. 1969); *Winston-Salem/Forsyth City U. N.C. Assn. of Ed v. Phillips*, 381 F. Supp. 644 (W.D. N.C. 1974) (Three Judge Court). The District Court recognized that the City is not obligated to bargain collectively with its employees. *Local 660, International Association of Firefighters, et al. v. The City of Charlotte*, 381 F. Supp. 500, 503 (W.D. N.C. 1974). *Accord, Government & Civil Employees Organizing Committee, C.I.O. v. Windsor*, 116 F. Supp. 354 (N.D. Ala. 1953) (Three Judge Court) *aff'd* 347 U.S. 901, 74 S. Ct. 429, 98 L. Ed. 1061 (1954).

This holding was implicitly affirmed by the Court of Appeals for the Fourth Circuit, which found that this limitation in the City's obligation does "not justify denying the request for withholding made by plaintiffs in this case."

Neither the District Court nor the Court of Appeals concluded that the City's refusal to check off union dues impinged upon respondents' First Amendment rights to freedom of association, despite the fact that the basis of the plaintiffs' complaint had been the First Amendment. The refusal to check off dues is so indirectly related to respondents' First Amendment rights that no such impingement exists. *C.O.P. v. City of Chicago*, 382 F. Supp. 624, 628 (N.D. Ill. 1974); *University of N.H. Ch. of A.A.U.P. v. Haselton*, 397 F. Supp. 107, 108 (D.N.H. 1975) (Three Judge Court); *See, Kirker v. Moore*,

308 F. Supp. 615, 621 (S.D. W. Va. 1970); *aff'd* 436 F. 2d 423, *cert. den.* 404 U.S. 824, 92 S. Ct. 49, 30 L.Ed. 2d 51 (1971); *Newport News F.F.A. Loc. 794 v. City of Newport News*, 339 F. Supp. 13, 17 (E.D.Va. 1972). Contrary to all authority the District Court and Court of Appeals found no distinction between union dues check off and withholdings for other purposes, and concluded that the City's refusal was arbitrary and constituted invidious discrimination against respondents. This was a judicial invention to which nothing in the pleadings pointed.

Collective Bargaining

As implicitly admitted by both lower courts, the City has no duty to collectively bargain with respondents or their union. Although the National Labor Relations Act is here inapplicable,* it does furnish some guidance as to the meaning of "collective bargaining." The Act requires employers and bargaining agents of employees to bargain with each other with regard to wages, hours and other terms and conditions of employment. National Labor Relations Act, §§ 8(a)(5), (d), 29 U.S.C.A. §§ 158(a)(5), (d); *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964).

The term "other terms and conditions of employment" subsumes dues check off. Indeed, check off has been held to be a "proper" subject of collective bargaining, *N.L.R.B. v. Reed and Prince Mfg. Co.*, 205 F. 2d 131, 136 (1st Cir.) *cert. denied*, 346 U.S. 887, 74 S. Ct. 139, 98 L. Ed. 391 (1953). And it has been held to be a "mandatory" subject of collective bargain-

* The term "employer" as used in the Act does not include the States or their political subdivisions. 29 U.S.C.A. § 152(2); *See, Bateman v. South Carolina State Port Authority*, 298 F. Supp. 999 (D.S.C. 1969).

ing under §§ 8(a)(5) and 8(d). *United Steel Workers of America v. N.L.R.B.*, 390 F. 2d 846, 849 (D.C. Cir.), *cert. denied*, 391 U.S. 904, 88 S.Ct. 1654, 20 L.Ed.2d 419 (1968).

In the private sector, employers are required only to bargain in good faith on the check off issue. Since the City has no duty even to bargain collectively on the check off issue or any other "proper" subject, it perforce has no duty to accede to a check off demand. In the give and take process of collective bargaining, a union might concede a point in order to obtain the benefits of check off. Respondents are seeking one of the fruits of this process when they are not entitled, as a matter of law, to any of those fruits.

The Fourth Circuit ignored the authorities cited by the City because in those cases "the request for withholding arose and was denied in the context of collective bargaining." The Fourth Circuit has stated the ultimate *non sequitur*. What the Fourth Circuit is saying is that dues check off can be denied by a City engaged in collective bargaining, but a City cannot deny it where there is no collective bargaining. Anomaly of anomalies. Hon. Frank H. McFadden and Hon. William C. Barber both correctly felt that the collective bargaining process is inextricably intertwined with the dues check off system. The two can't be separated, even in some mystical or theoretical way. The Fourth Circuit was both illogical and impractical.

Equal Protection

Equal protection analysis has two steps. In cases where there is an impingement of a fundamental right by a statute, rule or policy, or where a statute, rule or policy creates a classification which is based on criteria that are inherently "suspect", said impingement or classification may be justified only upon the showing of a "compelling state interest." *See*, e.g., *Houston v. Prosser*,

361 F. Supp. 295, 297 (N.D. Ga. 1973), and the cases cited therein. If, on the other hand there is no fundamental right involved or no suspect classification, the statute, rule or policy need only bear some rational relationship to a legitimate governmental interest. In short, where the asserted right is "explicitly or implicitly guaranteed by the Constitution," the challenged policy, statute or practice is subjected to strict judicial scrutiny. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34, 93 S. Ct. 1278, 36 L. Ed. 2d 16, *reh denied* 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418 (1973) (hereinafter cited as *Rodriguez*). Assuming, then, that respondents possess a First Amendment right to belong to the union, but that the City has no duty to collectively bargain with them, the issue becomes whether the City's refusal to check off union dues is merely a justifiable refusal to collectively bargain or is an arbitrary classification of respondents constituting an invidious discrimination in violation of their Fourteenth Amendment rights to equal protection of the laws.

Apparently, neither of the lower courts found the existence of any "fundamental" right or "suspect" classification, since both relied exclusively upon no "rational basis" for the City's refusal to check off. *Local 660 International Association of Firefighters, et al. v. City of Charlotte, et al., supra*, 391 F. Supp. at 502 (Finding of Fact No. 11).

The "compelling state interest" test should not apply. On brief in opposition to the writ of certiorari, respondents made the argument, implicitly rejected by the lower courts, that the City's refusal to check off impinges upon their First Amendment rights of association. Of course, any governmental classification can be said to impinge, to some degree, upon rights of association. *Rodriguez, supra*, 411 U.S. at 60 (Stewart, J., concurring); *Rinaldi v. Yeager*, 384 U.S. 304, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966). The question is whether the degree of impingement here, if any, mandates strict judicial scrutiny. Not every

limitation or incidental burden upon the exercise of a right expressly or implicitly guaranteed in the Constitution must be subjected to a stringent standard of review. *Pirincin v. Board of Elections of Cuyahoga County*, 368 F. Supp. 64, 71 (N.D. Ohio 1973); *Houston v. Prosser, supra*, 361 F. Supp. at 297-298; *Stottlemyer v. Stottlemyer*, 329 A. 2d 892, 895 (Pa. 1974). Furthermore, in determining whether the City's policy of refusing to check off union dues violates equal protection, a presumption in favor of the constitutionality of the City's actions must be indulged. *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961); *Pirincin v. Board of Elections of Cuyahoga County, supra*, 368 F. Supp. at 71.

There is no right to union dues check off explicitly or implicitly guaranteed by the Constitution. As noted, respondents argue in their brief opposing the writ of certiorari that refusal to check off impinges upon their rights to freedom of association guaranteed by the First Amendment although neither of the lower court opinions was based on such a finding. Such impingement, if it exists at all, is negligible, since it is conceded that respondents have a First Amendment right to belong to the union. *Atkins v. City of Charlotte, supra; See, Lontine v. VanCleave*, 483 F. 2d 966 (10 Cir. 1973); *Newport News F.F.A. Loc. 794 v. City of Newport News, supra.* The lower courts based their holdings upon the fact that the refusal to check off caused respondents to be ineligible for insurance plans and tended to hinder their ability to engage counsel. *See, e.g.*, District Court Findings of Fact Nos. 9 and 10, 391 F. Supp. at 502. In short, both courts found that the City's refusal to check off was "arbitrary and standardless", further found the existence of affirmative harm, *e.g.*, inability to obtain insurance, and accordingly concluded that the City's refusal to check off had no rational basis. *Id.* at 502-503. This is hardly the stuff from which fundamental rights arise. The City should not be forced to concede on a collective bargaining issue absent an express

finding of an impingement on a right more fundamental than that of obtaining group life insurance.

The subject "class" in the instant case can in no wise be called "suspect". A classification based upon union membership and a justifiable refusal to collectively bargain is not a classification based upon race, national origin, alienage, indigency or illegitimacy. *Rodriguez, supra,* 411 U.S. at 61 (Stewart, J., concurring).

Thus, the City's refusal to check off union dues impinges only on respondents' non-existent "right" to collective bargaining, not on their First Amendment right to freedom of association.

The City's policy of making certain wage deductions, while refusing to check off union dues, does cause some people to be affected differently from others. The equal protection clause is offended only if the City's policy is invidiously discriminatory, i.e., by establishing classifications that are wholly arbitrary or capricious. *Id.* at 60. The City is prohibited from collective bargaining. Dues check off is inextricably intertwined with collective bargaining. Thus, the City's refusal to check off union dues *has* a "rational basis." Indeed, to hold otherwise is to hold that the equal protection clause of the Fourteenth Amendment gives employees of the states and their political subdivisions the right to compel their employers to collectively bargain and, worse, that the employees take only the fruits and not the lumps. In sum, respondents have been totally frustrated in their previous efforts to show that they have a constitutional right to across-the-board collective bargaining. *Atkins v. City of Charlotte, supra; accord, Winston-Salem/Forsyth Cty. U.N.C. Assn. of Ed. v. Phillips, supra.* Having failed in their frontal assault, they are now seeking to raise *one element* of collective bargaining to the status of a fundemental right. Another element of collective bargaining is the strike, and respondents may

be expected to carry a successful outcome here to its logical conclusion.

There is no fundamental right to collective bargaining. *University of N.H. Ch. of AAUP v. Haselton, supra; Kirker v. Moore, supra,* 308 F. Supp. at 621; *Newport News F.F.A. Loc. 794 v. City of Newport News, supra,* 339 F. Supp. at 17. *A fortiori,* there is no fundamental right to check off. Even in the private sector, there was no right to collective bargaining until the enactment of the National Labor Relations Act. *See,* §1, National Labor Relations Act, §151, U. S. C. A. The right to collective bargaining should be conferred upon public employees only by Congress or the respective state legislatures.

The Fourth Circuit never talked about the "equal protection" clause, but apparently was relying on it because of its talk about "rational classification" and "no other standards or guidelines". If the Fourth Circuit is correct, then a new constitutional principle is being stated, namely that all elected makers of public policy must now state cogent reasons for all of their public decisions, and every time a City Council exercises its prerogative to make a decision it conceives to be the public wish and in the public interest, it must state a reason pleasing to the Federal Court. The question should be: "Was there a constitutionally valid reason for the City's action?" It should not be the question asked by the Fourth Circuit: "Did the City articulate its rationale?"

Public Policy

Amicus curiae fully comprehends that matters of constitutional right are not invariably dictated by public policy. However, it is significant that this Court in its long history has never held that the First Amendment grants to public employees the right to bargain collectively with their employer, the public. The

Congress has recognized the very material distinction between employees in the public sector and employees in the private sector. The real question here is whether this distinction is now to fade into memory by an innovative application of the First Amendment and/or the equal protection clause in a judicial rush to join the "Wave of the Future."

The opinion of the District Court and the opinion of the Fourth Circuit both fault the City of Charlotte for not having publicly stated legitimate reasons for distinguishing between checking off United Way contributions and checking off union dues. The reasons for distinguishing between these two are so obvious so as to require no statement, either from the City or from *amicus curiae*. They are the public policy of the City of Charlotte. They are the public policy of most municipalities and governmental units in the United States. They protect the people.

The general public recognition of the validity of this distinction is graphically illustrated by recent events in San Francisco, where the November 17, 1975 issue of *U.S. News & World Report*, at page 30, reports the following:

> By a 5-2 margin, San Franciscans approved a proposition forbidding strikes by police and firemen and requiring a no-strike pledge, with dismissal if it is broken. Police and fire forces recently struck and won high pay raises.

The thrust of the instant law suit is to blot out all distinctions between public and private employees, so as to create a powerful and publicly funded labor organization of public employees, obtaining a power position from which to demand and to enforce their will on the public. At the time the deputy sheriffs of Jefferson County were demanding check off (and simultaneously denying any claim to the right to strike) they, in fact, did strike in the form of a "sick in". Honorable William C. Barber took judicial notice of this fact from his own court records. Facts are facts.

If a long-standing public policy is to be eliminated in the name of the First Amendment freedoms or of equal protection, then the consequences of such a dramatic change must be fully understood and the risks carefully evaluated.

CONCLUSION

A deputy sheriff in Alabama serves judicial process. He makes arrests and reads the accused his rights. He protects life and property. He is as indispensable a part of the great American system of due process and public safety as is the Supreme Court of the United States. He shares another thing in common with members of the Supreme Court. He is not elected. He is appointed to his office, and serves during good behavior. In the opinion of *amicus curiae* he shares one other important thing in common with members of the Supreme Court. He is under paid, when one considers his increasing work load and inflation. Does the Supreme Court of the United States consider that it has the right to conduct a "sick in" or a "slow down" or a "strike" in order to force the public, through the elected Congress, to increase its compensation, or does the Supreme Court of the United States rely for fair treatment upon the political processes provided by the Constitution of the United States? If a deputy sheriff (or a fireman) has the right to insist upon full collective bargaining and upon union recognition in order to enforce his wage and work demands, his right, to be meaningful, must be based on the strike as the ultimate bargaining weapon, and no amount of rationalization can change the fact. The evidence is overwhelming. The total effect of such a doctrine would be devastating.

What this Court says in this case on the single most important issue to come before it this term, will have an impact far beyond the City of Charlotte, and far beyond 1975. It will be momentous. *Amicus curiae* humbly submits that the result will be

chaos if the Court does not overrule the self-contradicting and poorly reasoned opinion of the Fourth Circuit.

Respectfully submitted

.....

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.....

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Of Counsel for Amicus Curiae

Certificate of Service

I, William M. Acker, Jr., one of the attorneys-of-record for *amicus curiae*, hereby certify that I have, by U. S. Mail postage prepaid, mailed a copy of the foregoing brief to Mr. Jonathan Wallas, Suite 730, East Independence Plaza, 951 South Independence Boulevard, Charlotte, North Carolina 28202, counsel for respondents-appellees, and to Mr. W. A. Watts, City of Charlotte, 600 East Trade Street, Charlotte, North Carolina 28202, counsel for petitioners-appellants, this 26th day of November, 1975.

.....

WILLIAM M. ACKER, JR.

APPENDIX

In the

Supreme Court of the United States

October Term, 1975

No. 75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil C. Williams, as members of the Charlotte City Council and individually,

Petitioners,

v.

Local 660, International Association of Fire-Fighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight and R. D. McCall, as officers of Local 660 and individually,

Respondents.

No. 75-250

CONSENT FOR FILING BRIEF OF AMICUS CURIAE

Whereas the above-captioned case is now before the Supreme Court of the United States and is scheduled to be heard during the October Term of 1975; and

Whereas Melvin Bailey, Sheriff of Jefferson County, Alabama desires to file a brief of *amicus curiae* in the above-captioned case, he being in effect a public employer of employees who have filed an action against him in the U. S. District Court, the northern district of Alabama, Civil Action No. 75-M-0021, March 17, 1975, which case has raised substantially the same questions before the Court in the above-captioned case.

Now, Therefore, petitioners and respondents, through their respective attorneys, being all the parties before the Court do hereby voluntarily consent and agree that the said Melvin Bailey may file an *amicus curiae* brief on the merits in the above-captioned case in accordance with Rule 42, Section 2 of the Supreme Court Rules.

This the 13th day of November, 1975.

/s/ W. A. WATTS
W. A. WATTS
City of Charlotte
600 East Trade Street
Charlotte, North Carolina 28202
Counsel for Petitioners-Appellants

/s/ JONATHAN WALLAS
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Charlotte, North Carolina 28202
Counsel for Respondents-Appellees

In the United States District Court
For the Northern District of Alabama
Southern Division

American Federation of State, County and Municipal Employees Union, AFL-CIO, Local No. 2557; James C. Thomas, Robert H. Cordell; Harold Reach, Individually and as Representatives of a Class,
Plaintiffs,
vs.
Melvin Bailey, Sheriff of Jefferson County, Alabama; Jefferson County Commission, a Body Corporate and Politic; Tom Gloor, Benjamin Erdrich and W. Cooper Green as Members of the Jefferson County Commission,
Defendants.

Civil Action No. CA 75M0021S

COMPLAINT

1. The jurisdiction of this court is invoked under Title 42, United States Code, Section 1983 and Title 28, United States Code, Section 1331(a) and Section 1343(3) and (4).

2. Plaintiff union is a voluntary, unincorporated labor organization with principal offices located in Jefferson County, Alabama, and is engaged in this judicial district in representing deputy sheriffs who are employed by the Jefferson County Sheriff's Department. Individual plaintiffs are residents of Jefferson County, members of plaintiff union and are employed by Jefferson County Sheriff's Department.

3. The defendant sheriff of Jefferson County is a resident of Jefferson County and the elected head of the said Sheriff's Department. Defendant, Jefferson County Commission is a body corporate and politic. Said defendant is the governing body of Jefferson County. Said individual defendants are elected members of said County Commission and are residents of Jefferson County, Alabama.

4. This suit is brought by individual plaintiffs on their behalf and on behalf of others similarly situated. The class represented by individual plaintiffs consists of all employees of Jefferson County Sheriff's Department who are members of plaintiff union. This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class. The representative plaintiffs will fairly and adequately protect the interests of the class and plaintiffs are typical of the class.

5. Plaintiffs have sought to exercise their rights as employees and union members and have sought to have their union dues deducted from their pay checks and paid to plaintiff union. The defendants have failed or refused to allow plaintiffs to do so; and for no good reason other than to hinder said employees in the exercise of their rights to form and belong to a labor union. Even though other deductions are allowed for other employees for other reasons and for the benefit of other organizations.

6. Defendants have sought to discriminate, and have in fact discriminated, in the hiring of new employees by asking them how they feel about belonging to a union, and would they become a union member if they were hired. If they were in favor of a union they were not hired.

7. Defendants have failed and refused to pay plaintiffs for sick leave; after said plaintiffs met the requirements for obtaining paid sick leave. This action taken by the defendants because plaintiffs are union members. Defendants discriminate against plaintiffs in "paid sick leave" in that those who *are* union members are not paid and those who *are not* union members are paid.

8. Defendants harrass plaintiffs who are members of plaintiff union, by following them around on their beats (while patroling); lowering their efficiency ratings, and transferring them from one assignment to another solely because of their activities in plaintiff union.

Wherefore, Premises Considered, plaintiffs pray the court shall enter its order:

1. Temporarily mandatorily enjoining defendants:

(a) From preventing plaintiffs obtaining dues check off with regard to their dues being deducted from their pay checks and paid to plaintiff union.

(b) From discriminating in hiring new employees who desire union membership; or who are sympathetic to the plaintiff union.

(c) From refusing to pay plaintiffs for sick leave when the requirements for obtaining sick leave are met by plaintiffs.

(d) From harrassing plaintiffs in any way whatsoever because of membership in said union.

2. That said injunction be made permanent upon final hearing.

3. That the rights, duties and responsibilities of the parties be declared by the court in regards to the controversies contained in this complaint.

4. For such other relief as may be just and proper, premises considered.

TARTER & WININGER
Counsel for Plaintiffs
By /s/ CHARLES TARTER
2101 City Federal Building
Birmingham, Alabama 35203

State of Alabama
Jefferson County } ss.

Before me, the undersigned Notary Public in and for said County in said State, personally appeared Harold Reach, as President of Plaintiff Union; Harold Reach individually, James C. Thomas, Robert H. Cordell, who being by me first duly sworn depose and say that the facts set forth in the foregoing Bill of Complaint are true and correct to the best of their knowledge, information and belief and upon such information, knowledge and belief aver that said facts are true.

Done this the 18th day of December, 1974.

/s/ HAROLD REACH
As President of Local 2557
/s/ HAROLD REACH
/s/ JAMES C. THOMA
/s/ ROBERT H. CORDELL

Sworn and Subscribed before me this 18th day of December, 1974.

/s/ MARIANNE McMANUS
Notary Public

(Seal)

In the United States District Court for the
Northern District of Alabama
Southern Division

American Federation of State, County, and Municipal Employees Union, AFL-CIO, Local No. 2557; et al., Plaintiffs
v.
Melvin Bailey, Sheriff of Jefferson County, Alabama; et al., Defendants
} Civil Action No. 75-M-0021

ORDER

This cause came on to be heard on defendants' motions to dismiss the complaint. The Court has examined the pleadings, considered the briefs submitted by the parties and has heard the oral argument of counsel. The Court is of the opinion that the motions are due to be granted in part and overruled in part.

I

Paragraph 5 of the complaint is due to be dismissed. Plaintiffs allege a deprivation of rights under the Equal Protection Clause of the fourteenth amendment in that defendants refuse to allow a voluntary deduction from employee pay checks for union dues. This contention is not sufficient to state a claim, under present law.

Union dues check-off is a familiar part of the collective bargaining process in the private sector. It is, at the very least, a

permitted subject for collective bargaining under the NLRA. Check-off is a frequent component of union contracts. It is apparent that check-off is so closely intertwined with collective bargaining that it is impossible to speak of it outside that context.

This close identification of dues check-off with collective bargaining raises an unsurmountable barrier for the plaintiffs. The sheriff and the County Commission have no duty to bargain with any representatives of the employees under Alabama or federal law. *AFSCME, Local 2557, et al. v. Bailey, et al.*, C.A. No. 73-P-199-S (N.D. Ala., June 13, 1973, Dec. 19, 1973) (hereinafter *Bailey I*); 29 U.S.C.A. § 152(2). Since plaintiffs may not force defendants to the bargaining table for general negotiations, the plaintiffs may not force defendants to bargain about one item that is inextricably part of the general collective bargaining process. The Court is not in a position to grant plaintiffs part of the fruits of collective bargaining when they are not entitled to any of those fruits.

Moreover, the plaintiffs are seeking an order of the Court to force defendants to allow union dues check-off. In the private sector, the employer need not grant a union demand for dues check-off. 29 U.S.C.A. § 158(d). If such a provision is included in the final contract, it is the product of the give and take of the bargaining process, perhaps with the union conceding a point in order to obtain the benefits of the checkoff. In the case at bar, plaintiffs, who do not have any collective bargaining "rights," wish the Court to give them a benefit they would not necessarily obtain if they could force defendants to bargain. Thus, the plaintiffs are left in the position where they do not have the same rights as private employees, and yet are demanding, as a matter of right, an item private employees can only hope to acquire through negotiation. The Court will not create a situation where public employees have at once more, and

less, rights than private employees, under the present state of the law in this area.[1]

Under the foregoing analysis, the plaintiffs are unable to state any set of facts under which they should be entitled to the relief they request. They are foreclosed by law. The Court declines to follow *Local 660, International Association of Fire Fighters v. City of Charlotte*, No. C-C-73-236 (N.D. N.C., September 4, 1974).

II

Paragraph 6, 7 and 8 do state a claim on which relief can be granted, even though paragraph 6 suffers a lack of clarity and precision. Defendants argue that *Bailey I* forecloses this Court from acting on at least some of the issues raised by these paragraphs, or that plaintiffs are due to be remitted to their right to seek a contempt citation for disobedience of the judgment entered in *Bailey I* before the judge who decided that case. This problem is more apparent than real, as the Court does not foresee any problem in conforming its action to the principles laid out in *Bailey I*, and will not be slow to remedy any contravention of the order entered by Judge Pointer. The fact that this Court is composed of a number of judges does not affect its essential unity.

Defendants also raise the question of whether plaintiffs should be required to state these claims as compulsory counterclaims in *Bailey v. AFSCME, Local 2557, et al.*, C.A. No. 188-000,

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[1] Defendants also contend that paragraph 5 is barred as res judicata from *Bailey I*. While the Court need not reach this point, given its disposition of paragraph 5, it would note that *Bailey I* was concerned with the first amendment rights of deputy sheriffs, and not their fourteenth amendment rights. The findings made in *Bailey I* expressly do not foreclose the issue of dues check-off. Under these circumstances, defendants' position does not seem well-taken.

Circuit Court for the Tenth Judicial Circuit of Alabama, under Rule 13(a), Ala. R. Civ. Pro. The Court sees this as a question of comity, and deems it inappropriate to deprive plaintiffs of their federal forum at this point in time.[2] The Court will take the proper action to avoid any undue interference with the state court action, should the need for such action arise in the future.

III

Accordingly, it is Ordered, Adjudged and Decreed that defendants' motions to dismiss be, and the same hereby are, granted as to paragraph 5 of the complaint. In all other respects the motions are overruled. Paragraph 5 of the complaint is hereby dismissed. Defendants shall answer the remaining claims within thirty days of the date of this order.

Done this 17th day of March, 1975.

/s/ FRANK H. McFADDEN
Chief Judge

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[2] The Court has been informed by counsel that the state court action, which dealt with injunctive relief against a "sick-out" by the deputies, is essentially over. The Court notes that the temporary restraining order entered in the case ran out, at the end of the last consent extension, on February 14, 1975.

In the Circuit Court
For the Tenth Judicial Circuit
of Alabama
In Equity

Melvin Bailey, as Sheriff of Jefferson County, Alabama,
Plaintiff,
v.
Tom Gloor, Ben Erdreich, Criss H. Doss, as Members of the Jefferson County Commission, Jefferson County, Alabama,
Defendants.

Civil Action.
No. 193-537.
In Equity.

COMPLAINT

Comes now Melvin Bailey, Sheriff of Jefferson County, Alabama, and sues Tom Gloor, Ben Erdreich, and Chriss Doss, as members of the Jefferson County Commission, and shows the court the following:

1. Plaintiff is the duly elected and acting Sheriff of Jefferson County, Alabama.

2. Defendant Tom Gloor is the duly elected president of the Jefferson County Commission. Defendants Ben Erdreich and Chriss H. Doss are duly elected and serving as Associate Commissioners of the Jefferson County Commission, a body corporate and politic, and said body is the governing body of Jefferson County, Alabama.

3. This is an action for a declaratory judgment that defendants have no legal authority to order plaintiff to deduct or "check off" union dues from the paychecks of the employees of the Jefferson County Sheriff.

4. Subject to the requirements of the Jefferson County Civil Service System, §§ 645 et seq., Appendix, Code of Alabama 1940 (Recomp. 1958), plaintiff, as Sheriff of Jefferson County, has ultimate supervisory power over the terms and conditions of employment of the employees of the Jefferson County Sheriff.

5. Employees of the Jefferson County Sheriff have no legal right to collective bargaining.

6. Dues "check off" is an essential concomitant of the collective bargaining process.

7. Plaintiff alleges the existence of a justiciable controversy in that defendants take the position that they have legal authority to order plaintiff to "check off" union dues of employees of the Jefferson County Sheriff, as more fully appears from Exhibits A and B attached hereto and made a part hereof.

Wherefore, plaintiff prays:

1. That process issue to each defendant.

2. That this court take jurisdiction of this cause and enter an order finding that, subject to the requirements of the Civil Service System of Jefferson County, §§ 645, et seq., Appendix, Code of Alabama 1940 (Recomp. 1958), plaintiff has ultimate supervisory power over the terms and conditions of employment of the employees of the Jefferson County Sheriff, that employees of the Jefferson County Sheriff have no right to collective bargaining, that the issue of union dues "check off" is an essential concomitant of the collective bargaining process, that defendants, as Commissioners of Jefferson County, Alabama, have no authority to order plaintiff to check off union dues of employees

of the Jefferson County Sheriff, and that plaintiff have such other and further relief as is just.

/s/ FRANK DOMINICK
FRANK DOMINICK
/s/ EZRA B. PERRY, JR.
EZRA B. PERRY, JR.
Attorneys for Plaintiff

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Of Counsel

EXHIBIT A

Jefferson County Commission
Ben Erdreich
Commissioner of Public Welfare
200-A Courthouse Birmingham, Alabama 35203
Telephone (205) 325-5504

August 21, 1975

Honorable Melvin Bailey
Sheriff of Jefferson County
Jefferson County Courthouse
Birmingh m, Alabama 35203

Dear Sheriff Bailey:

As you know several weeks ago, one of your deputies wrote to the Commission requesting deduction of monthly dues to his labor organization. Previously, there have been similar verbal requests from deputies on this matter.

By letter to the Commission you stated that you believed this issue was within your managerial prerogative as Sheriff and employer of Sheriff's Department employees.

It is my intent to bring this matter to the Commission for action by it next Tuesday. In view of your prior letter to us, I wanted to advise you of my action.

Sincerely

s/ BEN ERDREICH
BEN ERDREICH

BE/alb

EXHIBIT B

Thurs., Aug 21, 1975 The Birmingham News—31

Banking of the South.

Erdreich to call up checkoff

By Frances Spotswood
News staff writer

In a turn-around move next week, Jefferson County Commissioner Ben Erdreich will call for action on the issue of union dues checkoff.

For the past three years spokesmen for the sheriff's deputies union have been bringing up checkoff, asking the county commission to approve the deduction of union dues from union members' paychecks.

Tuesday, the county commissioner will bring up the matter.

Erdreich said he would have brought it up today for preliminary discusssion but the regular pre-commission meeting was cancelled for lack of a quorum. (In fact all three commissioners were away from the courthouse today.)

What Erdreich is going to bring up for commission is the latest formal union dues checkoff request—a letter from the deputies union president which was presented at the July 1 commission meeting.

In that letter President Harold Reach asked the commission to deduct one-twelfth of the annual union dues ($96) from his salary each month and submit the $8 to Local 2557 of the American Federation of State, County and Municipal Employes.

At the same meeting the County Commission read a letter from Sheriff Mel Bailey stating that dues checkoff is a "management prerogative of the Sheriff."

THE COMMISSIONERS simply referred the letters to County Atty. Andy Strickland.

Tuesday, Erdreich will call for action on Reach's letter and similar verbal requests.

The county commissioner has notified Sheriff Bailey by letter that he intends to do so, saying, "I wanted to advise you of my action . . . in view of your prior letter (which) stated that you believed this issue was within your managerial prerogative as Sheriff and employer of Sheriff's Department employes."

Erdreich commented Wednesday that there was a touch of irony in bringing up Reach's letter for commission action, but, he said, "Many others have made the same request."

Reach was dismissed from the Sheriff's Department in late July. He continues to serve as president of the deputies union and has appealed his discharge to the Jefferson County Personnel Board which will hear the appeal Oct. 16.

Although the union dues checkoff request has been made repeatedly, the issue has never come to a vote by the present county commission.

The previous commission unanimously denied the checkoff on several occasions.

Commission President Tom Gloor is the only member of the present commission who was in office when earlier votes were taken.

Circuit Court, Tenth Judicial Circuit of Alabama
Equity Division

Melvin Bailey, as Sheriff of Jefferson County, Alabama,
Plaintiff,
vs.
Tom Gloor, et al.,
Defendants.
Case No. 193-537.

FINAL DECREE

This cause presents a justiciable controversy properly brought in a court of equity. The pleadings require a declaration by the Court relative to an existing dispute between the Sheriff of Jefferson County and the members of the Jefferson County Commission. The prayer of the Bill of Complaint is that the Court declare that "plaintiff (the Sheriff) has ultimate supervisory power over the terms and conditions of employment of the employees of the Jefferson County Sheriff, that employees of the Jefferson County Sheriff have no right to collective bargaining, that the issue of union dues 'check-off' is an essential concomitant of the collective bargaining process, that Defendants, as Commissioners of Jefferson County, Alabama, have no authority to order Plaintiff to check-off union dues of employees of the Jefferson County Sheriff, and that Plaintiff have such other and further relief as is just". Although the Birmingham Labor Council and the United Steel Workers of America, AFL-CIO were not original parties, this Court did, at its own instance, invite their intervention in the cause and such Petition of Intervention is filed of record. The parties agreed, at a pretrial conference, that the issues involved in the cause could be agreeably submitted upon a stipulation of the parties, leaving

only the resolution by the Court of the legal questions as posed by the pleadings and the proof offered in the content of the stipulation. The said stipulation has been prepared and executed by all of the parties to the cause. The Court has heard statements and arguments of counsel and has been edified by excellent briefs submitted by the individual parties.

The Court finds as follows:

1. That the subject "check-off" system is an essential concomitant of the collective bargaining process.

2. That neither Plaintiff nor Defendants have any duty or authority to collectively bargain with unions or representatives of the employees of Jefferson County under Alabama or Federal law. (AFSCME, Local 2557, et al., Civil Action No. 73-P-199-S (N.D. Ala., June 13, 1973, December 19, 1973) AFSCME, Local 2557, et al. v. Bailey, et al., Civil Action No. 75-M-0021-S (N.D. Ala., March 17, 1975; 29 USCA, § 152 (2); Nichols v. Bolding, 291 Ala. 50, 277 So. 2d 868 (1973); Government and Civic Employees Organizing Committee, CIO v. Windsor, 146 F. Supp. 214 (N.D. Ala. 1953).)

3. That the Commissioners of Jefferson County, Alabama have no authority to order Plaintiff to check-off union dues of employees of the Jefferson County Sheriff nor to implement any such check-off.

4. That the Jefferson County Sheriff has no authority to check-off union dues of employees of the Jefferson County Sheriff nor to implement any such check off.

There exists in this case a crucial and far-reaching problem of public policy in this case, and this problem is dealt with and decided herein under the prayer for general relief as contained in the pleading. "Check-off" is inextricably intertwined with collective bargaining (see foregoing authority) and collective bargaining is inextricably interwined with the right to strike. The

general public has been granted immunity from threats of strike as a matter of legal history. Public employees are, in effect, working for themselves as members of the public body. We have seen graphic examples of the strike weapon in the City of New York and other states and even, lately, in the City of Birmingham and the chaotic and traumatic effect which has been produced thereby upon the whole public economy and the health, safety and general welfare of the public. Law enforcement personnel are particularly subject to having waived rights, when they engaged upon the pursuits of their employment, which they would have guaranteed to them if they were operating in the private areas of employment.

Nothing herein contained is meant by the Court to derogate from the legal and laudable activities of labor unions and their employee members, generally. We only treat of the subject submitted to the Court which involves labor union members who are government employees and their employers.

Accordingly, it is Considered, Ordered, Adjudged and Decreed by the Court as follows:

One: That the Commissioners of Jefferson County, Alabama have no authority to order Plaintiff to check-off union dues of employees of the Jefferson County Sheriff nor to implement any such check-off.

Two: That the Jefferson County Sheriff has no authority to check-off union dues of employees of the Jefferson County Sheriff nor to implement any such check-off.

Three: The costs of this action are taxed as follows: One-half (½) to Plaintiff and one-half (½) to Defendants.

Done and Ordered this 6th day of October, 1975.

/s/ W. C. Barber
Circuit Judge in Equity Sitting